Supreme Court, U.S.
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No. 98-____

In The

Supreme Court of the United States

October Term, 1998

RICHARD P. KRELL, et al.,

Petitioners,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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190 pp

QUESTIONS PRESENTED

I. Can a federal court assert pendent jurisdiction under 28 U.S.C. § 1367(a) by replacing the restrictive "factual interdependence" standard required by *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994) with a new, broader standard that would permit the assertion of federal jurisdiction when a common fraudulent scheme is asserted which gives rise to legally and factually distinct claims?

II. Does a federal court have the power under Article III to adjudicate abstract claims of Class Members asserted by Representatives solely through their status as Representatives contrary to this Court's holding in *Lewis v. Casey*, 518 U.S. 343 (1996)?

III. Can a federal court, consistent with the typicality requirement of Federal Rule of Civil Procedure 23, certify a class of eight million individuals, the majority of whom have only abstract "other claims"?

PARTIES TO THE PROCEEDING

The petitioners, objectors in the lower court, are Richard P. Krell, Elizabeth Bajek, Amanda Bajek, Helen Bartsch, Mark Ciconte, Raymond Dolce, Margaret Dolice, Louise Duggan, Peter Duggan, Charles Duncan, Mary Howe, Mary Krell, William Morris, Diana Racer, Thomas Racer, Gweneth Reidel, The Estate of Carl J. Scalzo, Marie Scalzo, Terry Sligar, Alice Smith, Jerry Smith and William Walton. The Representatives are Carol Nicholson, Martin Dorfner, Vincent Kuchas, Elizabeth Kuchas and Norman Gassman. Objector Richard E. Johnson intervened. The defendant is Prudential Insurance Company of America.

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OPINIONS BELOW

The July 23, 1998 opinion of the Third Circuit Court of Appeals is reported at 148 F.3d 283. App. 1-160. The August 17, 1998 order of the court of appeals denying rehearing and rehearing en banc is not reported. App. 459. The March 17, 1998 memorandum opinion of the district court approving the class settlement is reported at 962 F. Supp. 450. App. 161-458.

JURISDICTION

The court of appeals denied a timely petition for rehearing and rehearing en banc on August 17, 1998. App. 459. The judgment of the court of appeals was entered on October 28, 1998. App. 461. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Article III of the U.S. Constitution, 28 U.S.C. § 1367(a)and Fed.R.Civ.P. 23(a)(3) are involved in this matter. App. 463-468.

STATEMENT OF THE CASE

Overbroad Federal Rule of Civil Procedure 23 settlement classes pose serious harm to class members. Article III, however, provides protection for absentees and assures class cohesion by limiting the exercise of federal

jurisdiction and the standing of representatives to represent absentees. The lower courts' decisions have abolished these important Rule 23 and Article III protections.

This class action presents a myriad of individual questions. Those questions stem from: (1) eight defined claims based on three discrete sales practices; and (2) an unknown number of abstract "other claims" which were not asserted in the Complaint. App. 15-16, 24. Approximately eight million policyholders who engaged in about 10.7 million transactions during the fourteen year class period have been lumped together in this gargantuan nationwide class. App. 20. The suit challenges the individualized sales misrepresentations of thousands of prudential agents with respect to the 10.7 million transactions. Federal jurisdiction is predicated on the individualized federal securities law claims of only one Representative. App. 33. Most Class Members have no federal claims; most have no defined claims; and some may have no claims at all.

Judge Roth, concurring, recognized that this opinion establishes a "dangerous precedent" under 28 U.S.C. § 1367(a) that would "open the federal courts to a wide array of state claims whenever a complaint incorporates both federal and state claims, no matter how tangentially related the state claims might be to the federal claims upon which jurisdiction is based." App. 160.

The decision in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997) has closed the door on overbroad national class actions like this one. This Court should grant certiorari to determine whether federal courts can

evade the decision in *Amchem* through innovative interpretations of federal jurisdiction, standing and Rule 23.

1. Federal Jurisdiction Over The Defined And Abstract Fraudulent Sales Claims Of Eight Million Prudential Policyholders Was Based Upon The Federal Securities Law Claims Of One Representative

This entire federal proceeding is based upon one federal securities transaction of one Representative, Martin Dorfner. App. 33. Dorfner's claims under the federal securities laws arose from his purchase of a variable life insurance policy, a security. Based on this individualized transaction, the lower courts exercised supplemental jurisdiction over both the defined claims and the abstract "other claims" of millions of policyholders nationwide. At least 70% of the class insurance policies were not variable life insurance policies, and therefore, did not give rise to any federal claims. App. 33, 158.

A. The Class Complaint Asserted Claims Based On Three Discrete Sales Practices On Behalf Of Hundreds Of Thousands Of Policyholders

On September 19, 1996, after extensive discovery, the Representatives filed a Consolidated Second Amended Class Action Complaint (the "Complaint") on behalf of "all persons who purchased from Prudential new or additional life insurance policies, . . . *through Prudential's alleged fraudulent [sales] scheme.* . . . " App. 15, Compl. ¶ 174 (emphasis added). The pled class contained several hundred thousand policyholders. Compl. ¶ 175.

This Complaint alleged claims based on only three sales practices.[1] App. 15-16. It did not purport to represent the remainder of the eight million policyholders who were added to the Settlement Class only three days later, on September 22, 1996, when the parties filed their initial settlement agreement. App. 18, 20.

Under the heading "Description of the Lawsuit," the Class Notice defined the wrongful practices alleged in the Complaint as follows:

> (i) the use of an existing policy's cash value or dividend or interest stream to purchase or maintain a new policy or other policy by means of a surrender, withdrawal or loan (sometimes referred to as 'twisting' or 'churning');
>
> (ii) the number of out-of-pocket cash premium payments required to be paid for a policy and/or the benefits to be realized on a particular number of cash premium payments (sometimes referred to as 'vanishing premiums'); and

---

[1] Eight claims were alleged including Section 10(b) and Section 20(a) of the Federal Securities Exchange Act (variable life policies only), common law fraud, breach of contract, breach of good faith and fair dealing, negligent misrepresentation, negligence, negligent training and supervision, unjust enrichment and imposition of a constructive trust." Compl. ¶¶ 181-237. The Panel recognized that the contract claims involved individual issues of fact and presented "difficult burdens" of proof on issues such as the parol evidence rule. App. 88-91.

(iii) an assertion that the product being sold was solely or predominantly an investment or savings vehicle rather than a life insurance policy.

App. 475-477.

Each of these practices arose from a unique relationship between the Representatives and specific Prudential agents in Ohio, Pennsylvania, Connecticut, or Illinois. App. 16-17 n.11; Compl. ¶ 13.

Each of the five Representatives alleged injuries from one or more of the three asserted fraudulent practices – "churning," "vanishing premium" and "investment plan" sales tactics. Compl. ¶ 13.

Except for Dorfner, none of the Representatives with variable life insurance policies had timely federal security claims. *See* App. 15 (the Panel references the district court's May 10, 1996 opinion). The class claims arose in all 50 states during the 14 year class period and involved different oral and written factual misrepresentations and violations of different state laws. App. 6, 64-65.

B. The Settlement Class Engulfs Millions Of Policyholders With Only Abstract "Other Claims," Which Were Not Pled In The Class Complaint

The Settlement Agreement expanded the Class to include millions of policyholders who had no pled claims. To accomplish this expansion, the Settlement Agreement omitted the restrictive language in the Complaint class definition that limited the class to policyholders whose insurance purchases were affected by

Prudential's fraudulent sales scheme. As a result, the Settlement Class encompasses all eight million policyholders who purchased insurance during the fourteen year class period. App. 20. The vast majority of these policyholders will receive no relief whatsoever, because they failed to opt-in to the class relief. App. 482, 489, 510. The Panel recognized "the speculative nature of the tentative and imprecise settlement valuations." App. 126; *see also* App. 115 n.97 (remediation rate of 3%); App. 118 n.100.[2] The Panel stated that plaintiffs over whom a federal court has jurisdiction can release their "other claims." App. 104-105; *see also Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996). Objectors agree. Class counsel, however, negotiated that Prudential would pay them a $90 million fee.[3]

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[2] To recover through the ADR process, class members had to complete a sixteen page proof of claim form and, thereafter, as at trial, produce "evidence of deceptive conduct in order to support liability." App. 96 n.71. Only the owners of approximately 15% of the 10.7 million insurance policies at issue filed the one page election form necessary to receive either a proof of claim form or BCR relief. Therefore, the owners of at least 9 million policies will receive nothing for their releases. App. 538-540. The Multi-State Task Force Remediation Plan avoided this problem by allowing non-participants to retain their rights to sue. Task Force Report p. 20 ("Prudential's remediation program is entirely voluntary; consumers give up no rights if they choose not to participate other than the ability to participate in the ADR program.")

[3] Class Counsel included Milberg, Weiss, Bernshad, Hynes & Lerach and other firms. Although the district court approved their $90 million fee, the Panel reversed and remanded. App. 113-149.

In addition, as described in the Class Notice under the rubric "Description of the Proposed Settlement," the Settlement Agreement settled and released a fourth, unpled category of "other claims," defined as follows:

> (iv) Other Claims – If evidence shows other improper life insurance sales practices, you may be remedied through the cancellation of your Policy with a refund of some or all of the premiums you paid, including interest in some cases, or the insurance of a substitute product purchased with the amount otherwise available for refund.

App. 480, 487.

The Class Notice provides no additional information to the Class Members about the "other claims." The Settlement Agreement, however, does provide that the term includes the uniquely individual claims of "forgery and theft," which none of the Representatives had pled. Settlement Agreement, Section C(1) Exhibit B at p. 37.

2. The Lower Courts Held That There Was A Sufficient Nexus Between Dorfner's Security Claims And The Pendent Claims Of Millions Of Policyholders To Satisfy The "Common Nucleus" Of Operative Fact Test In *United Mine Workers Of America v. Gibbs*

The lower courts asserted ancillary jurisdiction under 28 U.S.C. § 1367(a), gilding their analysis with proper *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1996) "common nucleus of operative fact" language. App. 36-43. The courts concluded that a "common

scheme to defraud" could constitute a "nucleus of operative fact" between state and federal claims even though those claims require no common proof. App. 42.

The district court determined it had supplemental jurisdiction, because all the claims "relate to the same alleged development and implementation of the patently fraudulent sales techniques." App. 270. It held that the exercise of supplemental jurisdiction over the millions of pendent parties would "promote judicial economy and the convenience of and fairness to the parties." App. 271. However, the district court did not compare the facts that would support the elements of Dorfner's federal claims with the elements of the various state law claims. App. 267-272. Nor did the district court discuss how it could determine that the requisite *Gibbs* "nucleus of operative fact" existed when the millions of claims that allegedly arose from Prudential's alleged "other improper sales practices" were unidentifiable. App. 312.

The district court nevertheless held that the fraudulent scheme satisfied this Court's "nucleus of operative fact" test. The Panel, in a split decision on this jurisdiction issue, affirmed. App. 43. Judge Roth, concurring, called the Panel's decision a "dangerous precedent." App. 160.[4]

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[4] The district court also held it had diversity jurisdiction arising under 28 U.S.C. § 1332 and supplemental jurisdiction arising under § 1367(b). App. 43-50. The Panel declined to reach these diversity jurisdiction issues, which may not be properly before this Court. App. 50.

In her concurring opinion, Judge Roth asserted that 28 U.S.C. § 1367 overruled *Zahn v. International Paper Co.*, 414 U.S.

3. The Lower Courts' Holdings That The Representatives' Standing Extended To The Settlement Class Are In Conflict With Article III As Interpreted In *Lewis v. Casey*

The lower courts examined only the Representatives' claims, without analyzing the claims of the remainder of the nationwide class, to determine whether the Settlement Class could assert Article III standing. The district court, citing and quoting Professor Newberg, held that if the Representatives have standing, a further standing inquiry is unnecessary under Article III. App. 53.

The Panel affirmed because the record was "replete with examples of the adversarial nature of these proceedings" and the Representatives had stated a "valid 'case or controversy' with respect to Prudential's alleged fraudulent sales scheme." App. 57. Because each of the Representatives suffered an " 'injury-in-fact' as a result of Prudential's sales practices," the Panel found they had standing to bring suit and, therefore, satisfied Article III. *Id.* The Panel concluded that because the Representatives satisfied Article III, they had standing to represent the entire Settlement Class. App. 53.

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291 (1973). Other courts have held that § 1367(a) does not overrule *Zahn*, to permit a district court to assert ancillary jurisdiction over millions of pendent parties. *See, e.g., Russ v. State Farm Mut. Auto Ins. Co.*, 961 F. Supp. 808, 819 (E.D. Pa. 1997); *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1428-31 (2d Cir. 1997). *See also Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996) (where, unlike here, the corporations' federal and state claims were dependent on virtually the same claims).

The Panel also relied on Professor Newberg's position that "[o]nce threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense." App. 53 (citing 1 *Newberg on Class Actions* § 2.05 at 2-29 (3d ed. 1992)). Neither lower court analyzed or even cited this Court's rejection of this position in *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

4. The Lower Courts Certified A Nationwide Class Of Eight Million Policyholders, Finding That The Alleged Common Scheme Satisfied The Rule 23 Requirements

The district court certified this eight million member class, holding that "Prudential's alleged intentional use of the fraudulent sales tactics provides the 'single central issue' lacking in *Georgine* [83 F.3d 610 (3d Cir. 1996)]" and deemed Krell's argument that the abstract "other claims" defeated predominance "creative, but unpersuasive." App. 296, 312. Moreover, the court held that "typicality is clearly fulfilled. All of the named plaintiffs allege that Prudential maintained a scheme to defraud policyholders. . . . The absent class members purportedly were subjected to the same scheme and deceptive sales practices as these representatives." App. 314.

The Panel also rejected Krell's contention that the abstract "other claims" rendered the class uncertifiable and affirmed the district court's decision to certify the class, holding that "the 'proposed class has sufficient unity so that absent members can fairly be bound by the

decisions of class representatives,' " App. 79 (citing *Amchem*, 117 S. Ct. at 2248). The central theme of the Panel's certification opinion is that the alleged common scheme created the class unity required under Rules 23(a) and (b). The Panel found that "[t]he named plaintiffs, as well as the members of the named class, all have claims arising from the fraudulent scheme perpetrated by Prudential." App. 66. Therefore, "the factual distinctions between the named plaintiffs and the 8 million putative class members do not defeat a finding of typicality." *Id.*

REASONS FOR GRANTING THE WRIT

I. A FEDERAL COURT CANNOT ASSERT PENDENT JURISDICTION UNDER 28 U.S.C. § 1367 BY REPLACING THE RESTRICTIVE "FACTUAL INTERDEPENDENCE" STANDARD REQUIRED BY *KOKKONEN* WITH A NEW, BROADER STANDARD THAT WOULD PERMIT THE ASSERTION OF FEDERAL JURISDICTION VIRTUALLY ANY TIME A COMMON FRAUDULENT SCHEME IS PLED WHICH GIVES RISE TO LEGALLY AND FACTUALLY DISTINCT FEDERAL AND STATE CLAIMS

The *Gibbs* "common nucleus of operative fact" test demands a "factual interdependence" between the elements of the state and federal claims. *Peacock v. Thomas*, 516 U.S. 349, 379 (1996). This requires a careful analysis of what facts will be required to prove the federal and the pendent party claims asserted. An alleged "common scheme to defraud" does not satisfy this Court's "factual interdependence" requirement, but apparently satisfies

the lower courts' broad new standard for ancillary jurisdiction. App. 42.

The lower courts and this Court use the key phrase "common nucleus of operative fact" quite differently. Under the lower courts' holdings, where a "widespread scheme to defraud policyholders" is pled, a comparison of the facts necessary to prove the elements of the individual state and federal claims apparently is not required. App. 41. To the lower courts, "a common nucleus of operative fact" exists when there is an alleged "deceptive scheme to defraud customers." App. 41. The lower courts' standard is far different than this Court's "common nucleus of fact" requirement under which the facts that would support the elements of the federal and state claims must be carefully analyzed to determine if they overlap.

A. This Court's *Kokkonen* "Factual Interdependence" Ancillary Jurisdiction Requirements

In *Gibbs*, this Court defined the test for supplemental jurisdiction, requiring that "state and federal *claims* must derive from a common nucleus of operative fact." *Gibbs*, 383 U.S. at 725 (emphasis added). *Gibbs* held the exercise of jurisdiction appropriate where the "plaintiff's claims [are] such that he would ordinarily be expected to try them all in one judicial proceeding." *Id.*[5]

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[5] The Panel only held that the Representatives could be expected to try "their" own state claims. App. 54. It did not hold that they could be expected to try the claims of absent class members.

In *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), the court coined another term for this prerequisite, stating that ancillary jurisdiction is appropriate where the claims satisfy this Court's "factual interdependence" requirement. *Id.* at 379. Thereafter, in *Peacock v. Thomas*, a case presenting pendent party jurisdiction, as here, this Court held that where "factual interdependence" is absent, "[n]o greater efficiencies would be created by the exercise of federal jurisdiction over [supplemental claims]." *Peacock*, 516 U.S. at 356. Therefore, under both *Kokkonen* and *Peacock*, the exercise of supplemental jurisdiction turns on whether the facts necessary to prove the elements of the federal and state claims will overlap.

B. The Lower Courts' Common Scheme Jurisdiction Requirements Conflict With *Kokkonen*

The lower courts' jurisdiction standard is much easier to satisfy because it does not focus on the facts necessary to support the elements of the federal and state claims. App. 41-43. Instead, it looks to the abstract context, including managerial encouragement of fraudulent sales practices, in which the Class Members' claims occurred.[6] App. 41.

The lower courts' opinions obscure the key fact that while the alleged common scheme may provide an

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[6] After a very extensive factual investigation, the Multi-State Task Force issued its July 9, 1996 Report, in which it concluded that no such agent training existed. App. 9-11; Task Force Rep. pp. 169-173. For example, the report stated, "[t]here appears to be little if any consistency in agent awareness of guidelines and agent training." Task Force Rep. p. 173.

abstract contextual framework for policyholders' claims, it does not create the "factual interdependence" necessary for supplemental jurisdiction. *Kokkonen*, 511 U.S. at 379-82. Neither lower court reviewed the elements of the federal and state claims to determine whether the same facts would basically support both.

The facts necessary to prove the elements of the seven alleged state claims brought on behalf of millions of pendent parties have no factual overlap with Dorfner's 1991 federal security claims.[7]

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[7] Even if Prudential's alleged common sales scheme was established, each of Prudential's eight million policyholders may or may not be able to establish one or more of the elements of their eight claims in their Complaint. This is because the factual and legal elements of these claims are unique and not interdependent on the existence of the alleged "widespread scheme to defraud." App. 41; *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998). Neither lower court evaluated the hundreds of variations of pendent claims under the laws of the fifty states which were alleged to arise out of the same "nucleus of operative fact" as Dorfner's 1991 federal security claims and Pennsylvania state claims. Class claims arose from hundreds of different state laws. The Panel indicated that, while the multiple state law questions might create manageability issues, they would not thwart satisfaction of Rule 23(b)(3)'s predominance requirement. App. 28 n.57.

The lower courts did not "group" state laws as required in the Third Circuit. *In re General Motors Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 799 n.22 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1995); *cf. Field v. Mans*, 516 U.S. 59, 73 n.12 (1995) (common fraud claims grouped). Instead, the burden of showing that state laws could not be grouped was shifted to the objectors. App. 76.

Each Representative and class plaintiff must prove that an insurance agent induced him or her to purchase insurance by using misrepresentations or otherwise violated the law in his or her state. "[T]he ADR process will require evidence of deceptive conduct in order to support liability." App. 63 n.48; App. 96 n.71. The "other claims," which are unknown, cannot be subjected to this comparative analysis. App. 24 n.20. The Panel's expansive interpretation would allow district courts to assert § 1367(a) supplemental jurisdiction unless the claims were "totally unrelated." App. 40.

This is why Judge Roth, concurring in the Panel's opinion, correctly concluded that the majority's supplemental jurisdiction holding was far too expansive and established a "dangerous precedent." App. 160.

II. ARTICLE III DOES NOT PERMIT A FEDERAL COURT TO EXTEND REPRESENTATIVES' STANDING TO ENCOMPASS ABSENTEES WHO ASSERT CLAIMS THE REPRESENTATIVES DO NOT ASSERT

Membership in a Rule 23 settlement class is not *de facto* Article III standing. "That a suit may be a class action . . . adds nothing to the question of standing." *Lewis*, 518 U.S. at 357. Disregarding this fundamental tenet, the courts below allowed the Representatives, who could not assert most of the claims of the Settlement Class, to bootstrap the Settlement Class into federal court through Rule 23. App. 41-43. This practice offends this Court's decision in *Lewis v. Casey*.

In *Lewis*, this Court expressly rejected the notion that the Article III standing of absent class members could be established solely through the standing of the Representative. In his dissent in *Lewis*, Justice Stevens, like the lower courts, maintained that the standing of the two named plaintiffs was sufficient to establish standing for the entire class. *Lewis*, 518 U.S. at 407-09. Relying on Professor Newberg, Justice Stevens stated that "[i]f named class plaintiffs have standing, the standing of the class members is satisfied by the requirements for class certification." *Id.* at 408 n.4.

This Court disagreed and stated that "standing is not dispensed in gross." *Id.* at 358 n.6. This Court recognized that a plaintiff who has the right to complain of one administrative deficiency does not necessarily possess the right to complain of *all* administrative deficiencies. *Id.* A representative plaintiff can assert standing on behalf of only those class members who can assert "the injury-in-fact that the [representative] plaintiff has established. . . ." *Id.* at 357.

Based on the Complaint, the Representatives, at most, have Article III standing to represent themselves and class members with churning, vanishing premiums and investment plan claims. But this alone is not sufficient to assert standing on behalf of the class members with only "other claims" who were included in the all-encompassing Settlement Class. App. 24 n.20.

The "other claims" injuries are also abstract, and do not constitute an Article III injury-in-fact. To establish Article III standing, a litigant must demonstrate that he has suffered an injury-in-fact: "an invasion of a legally

protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted).

The injury "must be concrete in both a qualitative and temporal sense," *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), "not 'abstract' or 'conjectural' or 'hypothetical.' " *Allen v. Wright*, 468 U.S. 737, 751 (1984). If the injury is too abstract to be cognizable, there is no injury-in-fact for purposes of Article III. *See Whitmore*, 495 U.S. at 155-56. The "other claims" are not sufficiently concrete to constitute an injury-in-fact under Article III.[8]

Strict enforcement of the "actual injury" requirement is essential because it is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis*, 518 U.S. at 349. This principle must be adhered to even when actual encroachment on the other branches of government does not result. *Steel Co. v. Citizens For A Better Environment*, 118 S. Ct. 1003, 1016 n.4 (1998). The lower courts' "judicial inventiveness," *Amchem*, 117 S. Ct. at 2248, in extending standing to the "other claims" class members is antithetical to "the Constitution's central mechanism of separation of powers. . . . " *Lujan*, 504 U.S. at 559-60.

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[8] Contrary to the Panel's conclusion, the few other examples of sales abuses noted in the Complaint are insufficient to extend an injury in fact to all "other claims." App. 16 n.10; App. 24 n.20; *see also* App. 54. The inherently sprawling scope of the "other claims" included in the Settlement eclipses the discrete and limited additional claims identified by the Panel.

III. THE TYPICALITY REQUIREMENT OF RULE 23 PROHIBITS THE CERTIFICATION OF A CLASS OF EIGHT MILLION POLICYHOLDERS, THE MAJORITY OF WHOM HAVE ONLY ABSTRACT "OTHER CLAIMS"

Rule 23 was "designed to protect absentees by blocking unwarranted or overbroad class definitions. . . . " *Amchem*, 117 S. Ct. at 2248. To protect absentees, a court must find the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 2249. *See also In re Asbestos Litig.*, 134 F.3d 667, 677 (5th Cir. 1998) (Smith, J., dissenting), *cert. granted sub nom. Ortiz v. Fibreboard*, 118 S. Ct. 2339 (1998). Fed. R. Civ. P. 23(a)(3) requires that the class representatives' claims be typical of the class claims. Typicality is designed to align the interests of the class representatives and the absent class members, so that the representatives will advance the interests of the absentees by advancing their own interests.[9] *Amchem*, 117 S. Ct. at 2251 n.20.

Here, the lower courts defined Rule 23's typicality requirement so broadly as to render its protection meaningless. App. 66-68. According to these courts, if all class claims, whether asserted or abstract, arise from a common fraudulent scheme, the typicality prerequisite is satisfied. App. 66. The lower courts found typicality present

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[9] The lower courts' expansive interpretation of typicality conflicts with Rule 23's requirement that representative claims and the class claims be closely "interrelated." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). A "general sort of commonality" is insufficient. *In re Asbestos Litig.*, 134 F.3d at 682 (Smith, J. dissenting).

even where most class claims, the "other claims," are unidentifiable.[10] *Id.*

Typicality only provides that protection if it is interpreted to require a close identity between class representatives' claims and class claims. To give meaning to the typicality protection, courts must carefully compare the elements of the claims to determine whether each individual must prove overlapping facts to recover. While the lower courts' "bold aggregation technique[ ]," *Amchem*, 117 S. Ct. at 2252, was a well-intentioned attempt to provide a framework for the settlement of nationwide

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[10] Under the lower courts' opinions, not only can supplemental jurisdiction, standing and typicality be satisfied by an allegation of a widespread fraudulent scheme, but also Rule 23 predominance. App. 72-77. Under the lower courts' holdings, even millions of individual factual questions of "reliance" do not destroy predominance. App. 73. Nor is "predominance [ ] defeated because the class claims are subject to the laws of the fifty states." App. 76. Contrast *Broussard*, 155 F.3d at 342:

> In fact, recognizing the inherent individuality of the required analysis, the Fifth Circuit has flatly held that "a fraud class action cannot be certified when individual reliance will be an issue." *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). And the Sixth Circuit has indicated that claims that "require[ ] proof of what statements were made to a particular person, how the person interpreted those statements, and whether the person justifiably relied on those statements to his detriment" are not susceptible to class-wide treatment. *Sprague*, 133 F.3d at 398.

The Panel stands alone in this Rule 23(b)(3) class upholding a class certification that presented millions of individual reliance issues.

mass torts, statutory amendment is a solution that must be adopted by Congress, not developed piecemeal and *sui generis* by the federal courts.

CONCLUSION

In *Amchem*, this Court stated, "[n]o settlement class called to our attention is as sprawling as the one certified here." *Amchem*, 117 S. Ct. at 2250. Like the *Amchem* class, this nationwide class of Prudential policyholders could be characterized as "sprawling." Eight million policyholders nationwide who engaged in 10.7 discrete million transactions during the fourteen year class period have been drawn into this Settlement, even though most have no concrete claims alleged on their behalf, and most will receive no relief. The Rule 23 "requirements cannot be met for a class so enormously diverse and problematic as the one the District Court certified." *Id.*[11]

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[11] Unless this Court intervenes, the owners of over 9 million of the 10.7 million policies sold during the class period (over 85%) will have released their claims without receiving any consideration, because they did not "opt-in" to the settlement relief. *See* July 30, 1997 letter from Prudential to Class Counsel Melvin I. Weiss, which discusses the total number of BCR elections received. App. 538-540.

This settlement is analogous to the settlement in *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997) (cited in *Amchem*, 117 S. Ct. at 2249) where, after the payment of attorney's fees, the settlement left many class members with a net loss. The $90 million (or less) in attorney's fees that will be paid to Class Counsel will, in essence, be paid by class policyholders through their mutual insurer, Prudential, without receiving in exchange any

The lower courts' tampering could endanger Rule 23 itself. "The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches." *Steel*, 118 S. Ct. at 1016 n.4. The adventurous use of Rule 23 following *Amchem* warrants further review and guidance from this Court. *See, e.g., Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998).

For the reasons set forth above, this Honorable Court is respectfully requested to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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consideration. Since most policyholders will receive no recovery, they will be left with a net loss, like the class members in *Kamilewicz*.

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In re PRUDENTIAL INSURANCE COMPANY AMERICA SALES PRACTICE LITIGATION AGENT ACTIONS.

Richard P. KRELL, MDL transfer, N.D. Ohio, DNJ Civil Action No. 95-6062

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Richard P. Krell, as well as Objectors Elizabeth Bajek, Amanda Bajek, Helen Bartsch, Mark Ciconte, Raymond Dolce, Margaret Dolice, Louise Duggan, Peter Duggan, Charles Duncan, Mary Howe, Mary Krell, William Morris, Diana Racer, Thomas Racer, Gweneth Reidel, The Estate of Carl J. Scalzo, Marie Scalzo, Terry Sligar, Alice Smith, Jerry Smith, and William Walton, Appellants at Nos. 97-5155/5156/5312.

In re PRUDENTIAL INSURANCE COMPANY AMERICA SALES PRACTICE LITIGATION AGENT ACTIONS.

Richard Johnson, Intervenor-Plaintiff in District Court,

Richard E. Johnson, Appellant at No. 97-5217.

Nos. 97-5155, 97-5156, 97-5217 and 97-5312.

United States Court of Appeals, Third Circuit.
Argued Jan. 26, 1998.
Decided July 23, 1998.

Michael P. Malakoff (Argued), Malakoff, Doyle & Finberg, Pittsburgh, Pennsylvania, for Appellants Richard P. Krell, et al.

Lynde Selden, II, Lynde Selden Chartered, San Diego, California, for Appellant Richard E. Johnson.

Melvyn I. Weiss (Argued), Milberg, Weiss, Bershad, Hynes & Lerach, New York City, Allyn Z. Lite, Goldstein, Lite & DePalma, Newark, New Jersey, for Appellee George A. Zoller, Class Action Plaintiff Representative.

Reid L. Ashinoff (Argued), Michael H. Barr, Sonnenschein, Nath & Rosenthal, New York City, for Appellees Prudential Insurance Company of America and Ron D. Barbaro.

Brian S. Wolfman (Argued), Alan B. Morrison, Public Citizen Litigation Group, Washington, DC, for Amicus Curiae-Appellant Public Citizen, Inc.

John J. Gibbons, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, New Jersey, for Appellee Robert C. Winters.

Frederick B. Lacey, LeBoeuf, Lamb, Greene & MacRae, Newark, New Jersey, for Appellee Frances K. Beck, as Executrix of the Estate of Robert A. Beck.

Before: SCIRICA, ROTH and RENDELL, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

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This is an appeal from the approval of the settlement of a nationwide class action lawsuit against Prudential Life Insurance Company alleging deceptive sales practices affecting over 8 million claimants throughout the fifty states and the District of Columbia.

The class is comprised of Prudential policyholders who allegedly were the victims of fraudulent and misleading sales practices employed by Prudential's sales force. The challenged sales practices consisted primarily of churning, vanishing premiums and fraudulent investment plans, and each cause of action is based on fraud or deceptive conduct. There are no allegations of personal injury; there are no futures classes. The settlement creates an alternative dispute resolution mechanism and establishes protocols to determine the kind and amount of relief to be granted. The relief awarded includes full compensatory damages consisting of what plaintiffs thought they were purchasing from the insurance agent. There is no cap on the amount of compensatory damages for those who qualify, and although punitive damages are not included in the settlement, Prudential has agreed to pay an additional remediation amount in addition to the payments made through dispute resolution process.

The case involves five consolidated appeals from the judgments of the District Court for the District of New Jersey approving the settlement and awarding attorneys' fees to class counsel. Appellants, members of the certified class who object to the settlement, challenge the district court's jurisdiction, the certification of the settlement class, the fairness of the settlement itself, the award of attorneys' fees, and the district court's refusal to disqualify itself.

We hold the district court properly exercised jurisdiction. Federal subject matter jurisdiction is properly grounded on the alleged violations of the federal securities laws. Although most of the claims implicate state law, supplemental jurisdiction is proper because all of the claims arise out of a common nucleus of operative fact. The district court had personal jurisdiction over the class because actual notice was given to each of the 8 million policyholders by direct mail, and disseminated through television, radio and print advertising throughout the fifty states and the District of Columbia. We also hold there was no reason for the district court to recuse itself from these proceedings.

The district court properly certified a national class under Fed.R.Civ.P. 23(b)(3). The court assessed the numerosity and commonality of the asserted claims, the typicality of those claims, and the adequacy of representation provided by the named plaintiffs and class counsel, and found they satisfied the certification standards. The court also concluded the proposed class action was the superior means of addressing plaintiffs' claims of widespread sales abuse, and the issues common to all members of the class predominated over individual issues related to the members of the class.

We hold the district court properly evaluated the settlement, finding it fair, reasonable and adequate. Prudential's deceptive practices occurred nationwide. It may be argued that problems national in scope deserve the attention of national courts when there is appropriate federal jurisdiction. Because of the extraordinary number of claims, fairness counsels that plaintiffs similarly injured by the same course of deceptive conduct should

receive similar results with respect to liability and damages. The proposed class settlement offers plaintiffs several advantages, including full compensation for their injuries, no obligation to pay attorneys' fees, and a relatively speedy resolution of their claims. The alternative dispute resolution process is sensible and provides adequate safeguards for individual treatment of claims, including appeals. We will affirm the district court's approval of the class certification and the settlement.

The district court awarded $90 million in attorneys' fees as a percentage of a common fund created under the settlement. We will vacate and remand the fee award and ask the district court to recalculate the fee to account for work done by the multi-state task force whose efforts served as a basis for the final settlement in this case. Furthermore, we question the multiplier employed in the lodestar analysis used by the court to cross check the size of the fee award. Although granting discovery on fee applications is within the sound discretion of the district court, we will ask the district court to reconsider whether it should grant limited discovery to the objectors on the fee application.

I. BACKGROUND AND PROCEDURAL HISTORY

This case began in early 1994, when the first of many individual and class action lawsuits alleging improper sales and marketing practices was filed against Prudential, the nation's largest life insurer. As lawsuits began to accumulate, the New Jersey Insurance Commissioner sought to organize a group to investigate the allegations

against Prudential.[1] The resulting investigation into market conduct sought to determine the scope of any improper sales practices, and to develop a remedial plan designed to compensate injured policyholders, to prevent future violations, and to restore public confidence in the insurance industry. *Report of The Multi-State Life Insurance Task Force and Multi-State Market Conduct Examination of The Prudential Insurance Company of America* at 2 ("Task Force Report"). While the Task Force proceeded with its investigation, federal and state court actions alleging sales practice abuses by Prudential continued to accumulate. Although our primary concern is the outcome of the federal litigation, the history of both the Multi-State Life Insurance Task Force's investigation and the various lawsuits filed against Prudential overlap to a certain degree, and thus warrant discussion.

A. *The Multi-State Life Insurance Task Force*

At the instigation of the New Jersey Insurance Commissioner, the Multi-State Life Insurance Task Force was formed on April 25, 1995, with the stated goal of conducting a thorough and extensive examination of Prudential's sales practices during the period from 1985 until 1995. In all, thirty states and jurisdictions elected to participate.[2]

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[1] The New Jersey Department of Banking and Insurance also conducted an independent market conduct investigation of Prudential's New Jersey business. Its report was issued on July 9, 1996.

[2] According to the Task Force Report, eleven states and the District of Columbia "actively participated" in the investigation: Arizona, Arkansas, California, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Ohio, and

The Task Force interviewed 283 agents and 27 sales management executives, and reviewed voluminous materials provided by Prudential. Among those materials were internal computer data bases reflecting complaints, policy transactions, and agent discipline. The Task Force also reviewed market conduct reports prepared by other states which had examined Prudential's business practices, and examined the historical developments which affected sales practices in the insurance industry.[3]

Washington. These twelve jurisdictions represented approximately 36.5 percent of the 10.7 million Prudential policies sold during the investigation period. *Report of the Multi-State Life Insurance Task Force and Multi-State Market Conduct Examination of the Prudential Insurance Company of America* at 1-2 ("Task Force Report"). The Attorney General of the State of Connecticut began a separate investigation of Prudential in April 1995, in response to the filing of a class action complaint in United States District Court for the District of Connecticut. Although the Connecticut Insurance Commissioner subsequently joined the Multi-State Task Force, the Attorney General completed its independent investigation and issued a report on November 21, 1995.

[3] According to the Task Force Report, a combination of regulatory and economic changes in the 1970s and 1980s created an atmosphere within the insurance industry that was more amenable to the replacement of insurance policies. For example, the rise in interest rates allowed insurance companies to offer new products "designed to compete with banks, money market funds and newly founded life insurers," and thus led companies to abandon their usually conservative approach. Task Force Report at 7. At the same time, the original model replacement regulations, which stated that replacement transactions were generally not in the best interest of the customer, were modified to allow for these transactions in certain cases. *See* discussion *infra* § V.A.4. & n. 66. As a result of these changes, replacement activity flourished.

In July 1996, the Task Force issued its final report, citing widespread evidence of fraudulent sales practices and inadequate supervision by Prudential's management. It explained that Prudential's records revealed the company "knew of cases of alleged misrepresentation and other improper sales practices by its agents, and in many instances failed to adequately investigate and impose effective discipline." Task Force Report at 15. According to the report, interviews with Prudential agents revealed "little if any consistency in agent training and agent awareness of company and regulatory guidelines." *Id.* at 16. While the Task Force concluded that not all of the sales during the time period investigated were fraudulent or improper, it recognized the difficulty in ascertaining precisely which policyholders had been harmed,[4] and therefore recommended the implementation of a remediation plan which would "reach out to all potentially affected policyholders." *Id.* at 17-18. Under the plan, which was developed with Prudential's input and cooperation, policyholders were given the option of pursuing claims in an Alternative Dispute Resolution process ("ADR") or through a "no-fault" remedy known as Basic Claim Relief.[5]

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[4] The Task Force found that, "[b]ecause of the nature of the transactions and possible improprieties, an electronic analysis could not identify every instance of sales abuse or violation of law or regulation." Task Force Report at 6.

[5] The structure of this remediation plan was based on a settlement reached between a number of the class counsel here and New York Life Insurance Company in a similar class action. Task Force Report at 198.

As part of the Task Force Plan, Prudential agreed to conduct an extensive outreach program, including individual notice to all persons who purchased a policy between 1982 and December 31, 1995. Those electing the ADR process could submit their claim for evaluation. The remediation plan addressed four categories of claims: financed or replacement sales; sales involving abbreviated payment plans; life insurance sold as an investment; and other claims "falling outside of the first three categories." *Id.* at 19. Those electing Basic Claim Relief would be eligible for preferred-rate loans or the opportunity to purchase discounted policies.

Forty-three states and the District of Columbia signed a Consent Order adopting the Task Force Plan, with the understanding that if the pending class action achieved a better result, the Task Force and the states could join in the improved plan. The Task Force also recommended a separate $35 million fine to be divided among the states and the District of Columbia.

B. *The Federal Class Action*

While the Task Force was conducting its investigation, parties continued to file individual claims and class actions against Prudential in both state and federal court. On February 6, 1995, named plaintiff Nicholson filed a class action in Illinois state court which was removed one month later to the United States District Court for the Southern District of Illinois. The Kuchas plaintiffs filed their federal class action on February 28, 1995 in the District of Connecticut. Four other federal class actions were filed in the District of New Jersey in early 1995.

Appellant Krell filed his class complaint in Ohio state court in June 1995.

On April 26, 1995, Prudential moved to consolidate the various federal actions in the District of New Jersey. On August 3, 1995, the Judicial Panel on Multidistrict Litigation granted Prudential's motion and transferred several actions to the District of New Jersey.[6] Prudential then removed the various state actions to federal court, including the Krell action, and requested these additional cases be consolidated in New Jersey. The MDL Panel granted that request as well.[7]

In October 1995, the district court appointed Melvin Weiss of Milberg, Weiss, Bershad, Hynes & Lerach and Michael B. Hyman of Much, Shelist, Freed, Deneberg, Ament, Bell & Rubenstein as Co-Lead Counsel for plaintiffs, and ordered plaintiffs to file a consolidated complaint. On October 24, 1995, plaintiffs filed the First Consolidated Amended Class Action Complaint.

The named plaintiffs filed suit on behalf of all persons who purchased new or additional life insurance policies between January 1, 1980 and the time of the complaint as a result of Prudential's alleged fraudulent

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[6] More than 100 actions have been centralized in the District of New Jersey by the MDL Panel. *In re The Prudential Ins. Co. of America Sales Practice Litigation*, 962 F.Supp. 450, 479 n. 13 (D.N.J.1997) ("Fairness Opinion").

[7] Appellant Krell moved the district court to remand his case to state court. After the district court denied that motion on April 16, 1996, Krell filed a petition for mandamus relief with this Court. We denied that motion without opinion on September 25, 1996.

scheme.[8] They alleged that Prudential management developed and implemented a fraudulent scheme to sell life insurance policies through a variety of deceptive sales practices, including "churning," "vanishing premium," and "investment plan" sales tactics. Plaintiffs also challenged Prudential's dividend practices, among them the so-called "investment generation approach," and "Prudential's deceptive administration of class members' policies to conceal fraudulent sales and effectuate the scheme, including Prudential's use of unauthorized policy loans and similar contrivances to deplete policyholders' cash values." Lead Counsel Brief at 5. The Complaint alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, common law fraud, breach of contract, bad faith, negligent misrepresentation, negligence, unjust enrichment, and breach of state consumer fraud statutes.

On December 26, 1995, Prudential moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(6). At the same time, Prudential approached Lead Counsel to discuss a possible settlement. Those discussions ended, however, when Lead Counsel indicated they would not settle the case without significant discovery. The parties renewed their settlement discussions in early 1996, after Prudential agreed to provide discovery, but once again failed to reach an agreement. When the talks ceased, Prudential stopped its production of documents. Lead Counsel nevertheless pursued its own investigation, interviewing

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[8] Krell declined to join the class, claiming that Ohio policyholders with replacement claims deserved the protection of Ohio insurance law. Krell Brief at 5.

approximately thirty former Prudential agents and customers, and reviewing the limited array of documents provided by Prudential.

The district court granted Prudential's motion in part on May 10, 1996, dismissing without prejudice all claims of three of the five named plaintiffs, and several claims of the remaining two. It also noted that plaintiffs would not likely prevail on many of their claims at trial. The district court then ordered Prudential to provide plaintiffs with copies of the substantial discovery materials already provided to the Task Force.

Following the issuance of the Task Force Report in July 1996, Lead Counsel and Prudential once again entered settlement negotiations, and again Prudential agreed to Lead Counsel's demands for discovery.[9] By August 8, 1996, Prudential had provided plaintiffs with over 70 boxes of documents in response to Lead Counsel's requests.

On September 19, 1996, plaintiffs filed their Second Amended Consolidated Complaint. The Second Amended Consolidated Complaint contained essentially the same claims as the first, alleging Prudential implemented a systematic fraudulent marketing scheme which

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[9] According to Lead Counsel, the negotiations then proceeded through three stages. The first, from July 6th through August 16th, involved preliminary negotiation of the terms of settlement. During the second phase, which ran from August 17th through September 22nd, the parties negotiated the details of the actual Settlement Agreement. Finally, from September 23rd until October 28th, the parties worked out the final Stipulation of Settlement. Weiss Aff.¶ 103.

made use of false and misleading sales presentations, policy illustrations, and marketing materials. Once again, the Complaint specifically referred to Prudential's "churning," "vanishing premium," and "investment plan" sales tactics.[10] Each of the named plaintiffs claimed to have been injured by this common scheme, and alleged one or more of the specified sales practices.[11] Plaintiffs

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[10] While the Complaint stated that "Prudential's scheme involved [these] three notorious deceptive life insurance sales tactics," Second Am. Cons.Compl. ¶ 5, the allegations detailed therein also refer to other sales abuses which fall outside these three categories. *See, e.g.*, Second Am. Cons.Compl. ¶ 89-91 (alleging Prudential took affirmative steps to conceal its misrepresentations); ¶ 114-16 (alleging Prudential agents informed the Nicholson plaintiffs to "ignore" notices concerning lapses in their policies); ¶ 128 (alleging a Prudential agent made unauthorized withdrawals from the policy of named plaintiff Dorfner).

[11] Carol Nicholson brought suit as executrix of the estate of her deceased husband Keith. From 1966 to 1984, the Nicholsons purchased four Prudential policies worth approximately $30,000. In 1986, Keith Nicholson purchased an addition $100,000 policy, allegedly as a result of Prudential's fraudulent sales practices. Carol Nicholson alleged churning, vanishing premium and investment plan claims.

Martin Dorfner and his wife operate a small grocery store in Pennsylvania. By July 1989, they owned several Prudential policies. Dorfner alleges that his Prudential agent informed the Dorfners that they were entitled to a "free" policy, and proceeded to open another whole life policy for them using funds drawn from their existing policies. In addition, the same agent persuaded the Dorfners to purchase a $50,000 variable appreciable life insurance policy from Prudential in April 1991, allegedly using misleading sales information. Dorfner brought suit in January 1995, alleging churning and vanishing premium claims.

also sued several persons in their individual capacities: Robert A. Beck, Prudential President from 1972 until 1979 and Chairman from 1978 until 1987; Ronald D. Barbaro, Prudential's President from 1990 until 1992; and Robert C. Winters, Chairman and CEO from 1987 until 1994, and President from 1993 until 1994.

According to the Second Amended Consolidated Complaint, Prudential was aware of these fraudulent sales practices as early as 1982, when internal investigations discovered patterns of abuse involving financed insurance. Plaintiffs alleged that Prudential failed to take serious steps to combat the abuses, focusing instead on

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Vincent and Elizabeth Kuchas are Connecticut residents who purchased individual variable life policies from Prudential. In 1987, their agent suggested that they purchase additional policies. The Kuchases allege that they informed the agent that they were seeking an investment similar to an IRA, and could not afford an investment plan if they had to continue payment on their current Prudential policies. The agent allegedly persuaded the Kuchases to purchase two VAL policies while misinforming them as to their continuing payment obligations with respect to their initial policies. In September 1994, the Kuchases learned that the initial policies had lapsed and that their agent had taken out loans against the initial policies to pay for the VALs. They filed suit in February 1995.

Norman Gassman, an Ohio citizen, filed suit against Prudential in May of 1995, alleging an investment plan claim. According to Gassman, a Prudential agent persuaded Gassman to take $20,000 from a certificate of deposit and "invest" it in a VAL policy. Gassman alleges that the agent held himself out as a "financial planner" or "financial consultant" and explained that a VAL policy was part of an "investment plan," paid a higher rate of interest than a CD at a low risk, and was tax free. In reliance on these representations, Gassman purchased the VAL policy.

"damage control" and warning internal auditors not to "rock the boat." For example, when Prudential's auditing department tested a new computer system to detect churning in its Minneapolis office, sales dropped off sharply. Instead of addressing the concerns raised by the audit department, Prudential merely referred the matters to the "marketing" group, which took no steps to stop the fraudulent activities. Second Am. Cons.Compl. ¶ 86.

Three days after the filing of the Second Amended Consolidated Complaint, Prudential and class counsel entered into a settlement agreement. There were three preconditions to the agreement. First, those states which had adopted the Task Force Remediation Plan through the execution of the Consent Order had to agree to modify the Consent Order to conform to the Settlement Agreement. Second, the final Stipulation of Settlement had to be executed by October 28, 1996. Lastly, the parties reserved the right to modify the Stipulation of Settlement to reflect any new information revealed by class counsel's ongoing discovery.[12] The Settlement Agreement did not address attorneys' fees.[13]

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[12] On October 25, 1996, Prudential formally responded to plaintiffs' discovery requests, producing over one million pages of documents, 160 computer diskettes, and more than 500 audio and video tapes. *See* Weiss Aff. ¶ 85.

[13] Although § K of the Settlement Agreement was entitled "Attorneys' Fees, Costs and Expenses," subsection K.1 was left blank. Subsection K.2 addressed certain additional expenses to be included in any payment of fees, and guaranteed that any payment of fees would not reduce the remedies provided under the agreement. Subsection K.3 also provided that Prudential's liability for fees would be limited only to those fees expressly provided for by the Settlement Agreement.

On October 28, 1996, the parties filed a final Stipulation of Settlement. At that time, the district court issued an order conditionally certifying a national settlement class, directing issuance of class notice, issuing an injunction,[14] and scheduling a fairness hearing for January 21, 1997. The notice was sent to each of the more than 8 million class members by first class mail on or before November 4, 1996, and gave them until December 19, 1996 to file objections or opt out of the class.[15]

1. *The Proposed Settlement*

The proposed settlement was largely based on the Task Force Report and its proposed remediation plan. Like the Task Force plan, the settlement proposed a remediation scheme by which class members had the option of

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[14] The injunction barred policyholders from pursuing overlapping litigation unless the policyholder had opted out of the class, and prevented them from excluding other policyholders from the class. After the class notice was mailed, several named plaintiffs in a competing nationwide class action, filed and certified in Alabama state court three days after the Settlement Agreement was signed (the "Steele action"), opted out of the class. The so-called "Steele Opt-outs" also attempted, as class representatives in the Steele action, to execute opt-outs on behalf of the entire class. At Prudential's request, the district court issued an Order to Show Cause on January 22, 1997. On May 28, 1997, the district court ruled that the opt-out of the Steele class was null and void as a violation of the permanent injunction. The Steele Opt-outs filed an appeal with this Court. We affirmed the district court in an unpublished opinion.

[15] In December 1996, Krell moved the district court to recuse itself. The district court denied the motion, and Krell's subsequent petition for mandamus relief was denied by this Court without opinion on April 4, 1997.

either pursuing their claims through an Alternate Dispute Resolution procedure or electing Basic Claim Relief. The proposed settlement class included all persons who owned one or more Prudential insurance policies between January 1, 1982 and December 31, 1995, with certain exceptions.[16] The class included approximately eight million Prudential policyholders who own or owned approximately 10.7 million policies.

a. The Alternative Dispute Resolution Process

Under the ADR process contained in the proposed settlement, class members who believed they had been misled could submit a claim to Prudential. The claim form provided to all potential class members contained both narrowly drawn questions designed to elicit information relating to specific evidentiary scoring criteria established under the settlement, as well as more open-ended questions allowing claimants to explain the exact nature of their claims. Claimants were also asked to submit any supporting documents in their possession. Prudential established a toll-free hotline to allow claimants

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[16] The following were explicitly excluded from the class: (1) policyholders who were represented by counsel and had already settled a claim and signed a release with Prudential; (2) policyholders that are corporations, banks, trusts or other non-natural entities that purchased policies as corporate or trust-owned life insurance and under which (a) there are fifty or more separate insured individuals, or (b) the aggregate premium paid over an eight year period, ending with the close of 1996, exceeds $1 million; and (3) those policyholders who were issued policies in 1995 by Prudential Select Life Insurance Company of America. Stipulation of Settlement at 13.

to speak to a Claimant Support team, whose members are specially trained to answer policyholder inquiries, assist with filling out claim forms, and advise them with respect to the collection of supporting documents. Once the claim form was submitted, Prudential was obligated to locate all of its records pertaining to the claim and submit them for consideration.

Once a claim has been filed and all the relevant materials gathered, the claim is subject to a four tier review process. At the first level, the claim would be examined by a member of the Claim Evaluation Staff, who will apply a set of specific criteria for each of four general categories of sales complaints: (1) financed insurance (taking a loan against an existing policy in order to pay the premiums on a new policy); (2) abbreviated payment plans (using dividends from a policy to pay the premiums on that policy); (3) life insurance sold as an investment; and (4) other improper sales practices.[17] Based on the application of the established criteria, the reviewers then assign a score from zero to 3 to each claim.[18] The Claim Evaluation Staff is comprised of

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[17] The financed insurance criteria include an assessment of Prudential's conformity with state replacement laws.

[18] The scoring system set forth in the Stipulation of Settlement is as follows:

> – A score of "3" is assigned in the event that either (i) Company Documentation expressly supports the Misstatement, or (ii) the Agent Statement confirms the Claimant's allegation of the Misstatement and this confirmation is not undermined by Available Evidence.

specially trained Prudential employees who are not associated with Prudential's individual life insurance sales force.

Any claim not receiving a score of "3" will automatically be reviewed by a team of independent claim evaluators who are selected by class counsel and representatives of the state regulators. This team will apply the same criteria as the Claim Evaluation Staff, and make a written recommendation if it believes the claimant's score should be adjusted.

That recommendation is then examined by a member of the Claim Review Staff, which is comprised of

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– A score of "2" is assigned in the event that the alleged Misstatement is not expressly in writing and the Agent Statement denies the allegations, but (i) Available Evidence, on balance, supports the Claimant's allegation of the Misstatement, or (ii) the Agent has a Complaint History.

– A score of "1" is assigned in the event that the alleged Misstatement is not expressly in writing and the Agent Statement denies the allegation, and Available Evidence, on balance, neither supports nor undermines the Claimant's allegation of the Misstatement.

– A score of "0" is assigned in the event that Available Evidence exists which undermines the Claimant's allegation of the Misstatement and suggests that no Misstatement occurred.

– A score of "N/A" is assigned in the event that the Claim Resolution Factor is "not applicable" to the Claim submitted.

Prudential Alternative Dispute Resolution Guidelines, Stipulation of Settlement, Ex. B, at 9.

Prudential employees who have not worked as or had supervisory authority over Prudential sales agents. The determination of the Claim Review Staff may not be appealed by Prudential. The claimant, however, may appeal the decision to the fourth level of review, the Appeals Committee. The Appeals Committee is selected by class counsel and representatives of the state regulators from a list agreed upon by class counsel, the state regulators, and Prudential. While the Appeals Committee must apply the same criteria, its review of the claim is de novo.[19]

The relief afforded a claimant varies depending on the final score he or she is awarded. Those obtaining a score of zero are afforded no relief. Those with a score of "1" may obtain relief only through Basic Claim Relief. Those with scores of "2" or "3" are entitled to compensatory relief.[20]

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[19] During this phase of the review, claimants may receive cost-free representation from a representative selected by class counsel and approved by the state regulators. The claimant is entitled to a full rehearing if the representative determines that a "manifest injustice" has occurred.

[20] Under the Stipulation of Settlement, the following relief is available based on the category of claim proven:

> *Financed Insurance* – The policyholder may obtain a refund of the loans, dividends, or values improperly used, with interest in some cases. The policyholder also may be entitled to cancel the "new" policy and get back some or all of the premiums paid, with interest in some cases.
>
> *Abbreviated Payment* – The policyholder may be permitted to cancel the policy and obtain a refund of some or all of the premiums paid, with interest in some cases. Alternatively, the policyholder may be

b. Basic Claim Relief

Basic Claim Relief allows the class member to obtain one or more forms of relief without having to demonstrate liability on Prudential's part. The available forms of Basic Claim Relief include: (1) low interest loans to help policy holders make premium payments on existing policies; (2) enhanced value policies which allow members to purchase new policies with additional coverage paid for by Prudential; (3) deferred annuities enhanced by contributions from Prudential; and (4) the opportunity to purchase shares in designated mutual funds enhanced by a contribution from Prudential.

c. Enhancements To the Task Force Plan

The district court found the settlement improved upon the Task Force's remediation plan in several ways. Fairness Opinion, 962 F.Supp. at 492-95. First, the court found that the settlement improved the structure of the

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permitted to keep the policy without having to make any additional out-of-pocket payments for some or all of the premiums due.

Investment Product – The policyholder may be allowed to cancel the policy and obtain a refund of some or all of the premiums paid, with interest in some cases. Alternatively, the policyholder may be able to exchange the policy for an annuity.

Other Claims – If a policyholder was misled in some other way, the policyholder may be allowed to cancel the policy and obtain a refund of some or all of the premiums paid, with interest in some cases, or may be able to use the refund to purchase another policy.

Fairness Opinion, 962 F.Supp. at 490 (citing February 1, 1997 Notice at 7-8).

ADR process by including class counsel and their representatives in the monitoring process, and improving the claim scoring criteria[21] and evidentiary factors used to analyze ADR claims.[22] It also enhanced the remedies

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[21] The district court noted several improvements to the Settlement's ADR process that would enhance the ability of a policyholder to establish the presumption that he or she was misled. These enhancements to the ADR process were:

> (1) Provided that boilerplate statements in policy illustrations and contracts explaining that the dividends, interest or investment returns are "not guaranteed" or "non-guaranteed," will not independently undermine a claim;
>
> (2) Reduced from six complaints to three the number of policyholder complaints against an agent which would entitle a claimant to a score of at least "2"; and
>
> (3) Extended the period during which policyholder complaints would be considered from July 9, 1996 to February 1, 1997.

Fairness Opinion, 962 F.Supp. at 492.

[22] The district court also noted the proposed settlement "include[d] significant improvements in the factors and evidentiary considerations used to evaluate claims." Fairness Opinion, 962 F.Supp. at 492. The court found that the settlement enhanced the Task Force ADR plan by:

> (1) Allowing a claimant's score to be raised if documents originally kept by Prudential that could affect the scoring have improperly been destroyed and no copies can be located;
>
> (2) Allowing the claimant's score for "churning" to be raised if 12% of the selling agent's total sales were "financed insurance" sales, as opposed to a threshold figure of 15% under the Task Force plan;
>
> (3) Allowing a claimant's score to be raised if blank, unsigned disbursement forms were used without the policyholder's consent;

available through both the ADR process and Basic Claim Relief,[23] and provided for a blanket waiver of statute of

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(4) Allowing a claimant's score to be raised for "vanishing premium" claims if an agent used the phrases "vanishing premium" or "vanishing point" in writing in connection with the sale of the policy at issue;

(5) Removing as a negative consideration the fact that a policy lapsed prior to the date when the premiums were to "vanish", if it appears that the policyholder became aware, prior to the misrepresented "vanish" date, that the policy would not perform as illustrated;

(6) Requiring Prudential to contact agents regarding policies they sold to obtain additional information about the sale of the policy, and to encourage honest responses by agreeing not to take disciplinary action against an agent based on his or her truthful statements;

(7) Removing Prudential from its co-equal role with the regulators in the selection of a representative to advocate on behalf of the claimant at the arbitration level, and eliminating the $10 million cap on the funding the representative could receive; and

(8) Creating an entirely new position, the "Claimant Representative," selected by Class Counsel and responsible for overseeing the entire process on behalf of the claimant, including the initial claim review.

Id. at 492-93.

[23] The enhancements to the ADR remedies were:

(1) The settlement provided 100% interest to claimants scoring a "2" or a "3" in the ADR process (compared to the Task Force plan, which provided zero interest for scores of "2"), and allows rescission of the policy and a refund of the premiums, with interest;

(2) The settlement allowed a claim receiving a [sic] either a "2" or a "3" to receive relief where a policy lapsed before the claimant died, as opposed to the requirement under the Task Force plan that a claimant receive a "3." three.

limitations and other defenses which Prudential might otherwise have.

Second, it provided minimum financial guarantees which were not contained in the Task Force plan. In addition to the uncapped relief provided under both the Task Force plan and the proposed settlement, Prudential guaranteed to pay at least $260 million for each 110,000 claims remedied (up to 330,000), with a minimum payment of $410 million regardless of the number of claims remedied. Prudential also agreed to pay an additional remediation amount based on a sliding scale from $50 to $300 million, depending on the number of claims

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(3) Full compensatory relief for a vanishing premium claim where a Prudential agent promised the claimant would have a "paid up" policy;

(4) Removal of the exclusion in the Task Force plan which prevented claims on behalf of the decedent where the policyholder/decedent died while the policy was in force.

Fairness Opinion, 962 F.Supp. at 493-94.

The court found that the settlement enhanced the Basic Claim Relief by:

> (1) Eliminating fifty basis points on Optional Premium Loans;
>
> (2) Increasing Prudential's contributions to the annual premiums for Enhanced Value Policies;
>
> (3) Increasing Prudential's contributions toward the purchase price of Enhanced Value Annuities;
>
> (4) Creating a new form of Basic Claim relief known as Mutual Fund Enhancements, for which Prudential would contribute 4% of the initial purchase price to the fund, up to a maximum of $2,000.

Id. at 494.

remedied. This amount was to be allocated by the district court.

Finally, the district court noted the "Proposed Settlement establishe[d] an unparalleled outreach program to ensure that class members are adequately informed." Fairness Opinion, 962 F.Supp. at 492. This included mailing individual notice to over 8 million current and former policyholders, and publishing summary notices in the national editions of *The New York Times, The Wall Street Journal, USA Today,* and *The Newark Star Ledger.* The summary notice was also published in the largest newspaper in each of the fifty states and the District of Columbia. In addition, the Stipulation of Settlement provided that, following final approval of the settlement, post-settlement notice would be (a) mailed to each class member, (b) published in the national editions of *The New York Times, The Wall Street Journal, USA Today, The Newark Star Ledger,* and other regional newspapers, and (c) disseminated through television and radio advertising "on stations having representative regional coverage." Stipulation of Settlement at 27-29. Finally, the outreach program established a six-day-a-week toll-free "800" number, staffed by specially trained personnel, to answer class member questions.[24] The Task Force plan did not describe how its outreach program would be implemented. Fairness Opinion, 962 F.Supp. at 494.

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[24] At oral argument, Lead Counsel noted that approximately 1.8 million phone calls had already been processed. Tr. of Oral Argument, January 26, 1998, at 125 (Testimony of Melvyn Weiss).

2. The Fairness Hearing

The district court held the fairness hearing on February 24, 1997.[25] At that time the court heard oral argument from all parties who requested the opportunity to speak, including objectors. The district court also permitted appearances by several states and allowed the California Insurance Commissioner and the Florida Insurance Commissioner to appear as amicus curiae. The court allowed the Massachusetts Insurance Commissioner, the Massachusetts Attorney General and the Texas Insurance Commissioner to intervene under Rule 24(b). The New Jersey Department of Insurance appeared informally as amicus curiae, on its own behalf and on behalf of the Multi-State Life Insurance Task Force.

Before the fairness hearing, Prudential reached agreements with the remaining state objectors – California, Florida, Texas and Massachusetts – whereby several enhancements were made to the Proposed Settlement. Among those were an automatic score of "3" where a claimant had a life insurance application containing an unauthorized signature, and consideration as one of the scoring criteria the fact that a claimant was over the age of sixty at the time of sale.[26] These enhancements were

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[25] The district court postponed the hearing date, originally set for January 21, 1997, in order to allow policyholders more time to respond to the class notice and to provide the parties more time to prepare.

[26] The district court noted five enhancements which resulted from the negotiations between the state regulators and Prudential. These were:

subsequently incorporated into the settlement and made available to all claimants. Fairness Opinion, 962 F.Supp. at 473.[27] The district court also took notice that these four

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> (1) The extension of the complaint history cut-off until February 1, 1997;
>
> (2) An increase in the interest paid on claims receiving a score of "2" from 50% to 100%;
>
> (3) The addition of an evidentiary criterion allowing the claim evaluator to consider that a claimant was 60 years or older at the time of the sale;
>
> (4) The addition of a claim resolution factor awarding an automatic score of "3" if a claimant's life insurance application contained an unauthorized signature; and
>
> (5) The requirement that Prudential provide claimants, at the claimants request, with current account information, such as outstanding loans, dividend payments and "currently illustrated year of abbreviation."

Fairness Opinion, 962 F.Supp. at 498.

[27] Krell disputes this finding, and argues that the additional enhancements benefitted only the citizens of those four states. Krell Brief at 47 n. 56. Krell's argument relies primarily on its assertion that Florida residents received better notice and were benefitted by more favorable evidentiary presumptions, including a more favorable definition of replacements. *Id.; see also* Krell Reply Brief at 49-51. Lead Counsel responds that the court was correct to rely on Prudential's statements in open court to the effect that the enhancements would be available to all class members. Lead Counsel Brief at 58. Additionally, Lead Counsel notes that the district court found the settlement was fair and reasonable even without the state-negotiated enhancements. *Id.*

We disagree with Krell. At the Fairness Hearing on February 24, 1997, Krell raised his concern regarding the state-negotiated enhancements. Prudential explained that "the ADR

states received, in addition to the negotiated enhancements, additional fines and penalties from Prudential which were paid to the states, and not to aggrieved policyholders.

On March 7, 1997 the able district court issued a summary Memorandum Opinion and Order certifying the class and approving the settlement as fair and reasonable, and ten days later filed a lengthy (almost 250 pages) and thorough opinion explaining its decision.

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plan changes that were agreed to with the four states in terms of modifications of scoring and relief will be made available nationally through the class settlement." Tr. of Fairness Hearing at 141. An examination of the settlements signed by the four objecting states and the Amendment to Stipulation of Settlement filed by the settling parties supports the district court's finding. Also, while Prudential's explanation does not specifically respond to Krell's assertion that Florida residents received enhanced notice, we do not believe this is significant. As discussed *infra*, we find the notice provided under the settlement was adequate, and it is not rendered inadequate by any additional notice provisions negotiated by an individual state. Finally, Krell's argument with respect to replacement claims misses the mark. As Prudential explained at the hearing, the "scoring enhancements [in the ADR process] where there was a violation of state regulations on replacement will be based on each states' individual replacement regulations where the policy was sold . . . [t]he Florida provision is confirmatory and expands what is already in the plan." Tr. of Fairness Hearing at 174. Thus, any provision negotiated by Florida regarding the definition of replacement is based on Florida law and is not applicable to other states.

II. ISSUES RAISED ON APPEAL AND STANDARDS OF REVIEW

Appellants principally challenge five distinct elements of the settlement. First, they raise the threshold issue whether the district court had jurisdiction over this class action. Second, they challenge the court's certification of the settlement class. Third, they contest the district court's order approving the proposed settlement as fair and reasonable. Fourth, appellants take issue with the district court's $90 million award of attorneys' fees. Finally, they once more take aim at the district court's handling of this case, appealing the denial of their motion to disqualify under 28 U.S.C. §§ 455(a), 455(b)(1) and 455(b)(5)(iv).

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir.1975). Consequently, we will reverse the district court "for a clear abuse of discretion." *Id.* at 156 n. 7. In addition, the certification of a class and the award of reasonable attorneys' fees are also subject to an abuse of discretion standard. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 782 (3d Cir.1995) ("*G.M. Trucks*"). "An appellate court may find an abuse of discretion where the 'district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.' " *Id.* at 783 (quoting *International Union, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir.1987)). Our review of jurisdictional issues, however, is plenary.

Anthuis v. Colt Industries Operating Corp., 971 F.2d 999, 1002 (3d Cir.1992).

III. JURISDICTION

The Krell and Johnson appellants contend the district court lacked subject matter jurisdiction over most of the class, including objectors. Additionally, they contend that there is no Article III "case or controversy" with respect to the class claims, and that the court's exercise of supplemental jurisdiction was improper.

A. *Subject Matter Jurisdiction*

As an initial matter, the district court found it had subject matter jurisdiction over the named plaintiffs in this class action. In particular, the court found it had both federal question jurisdiction and diversity jurisdiction over the class, as well as supplemental jurisdiction under 28 U.S.C. § 1367. Fairness Opinion, 962 F.Supp. at 500.

The district court found exclusive federal question jurisdiction under 28 U.S.C. § 1331 based on the claims of named plaintiff Dorfner. Dorfner alleged violations of the federal securities laws, in particular Sections 10(b) and 20(a) of the Securities and Exchange Act, and Rule 10b-5 promulgated thereunder. In addition, approximately 30% of the policies at issue were registered securities, and thus fell within the court's federal question jurisdiction. The district court also found it had diversity jurisdiction over each of the named plaintiffs under 28 U.S.C. § 1332. All named plaintiffs were residents of different states

from the defendants named in the complaint. Additionally, the named plaintiffs have each alleged more than $50,000 in losses as a result of Prudential's fraudulent scheme, and thus meet the "amount-in-controversy" requirement in effect at the time the complaint was filed.[28]

The primary jurisdictional objection raised on appeal relates to the district court's assertion of supplemental jurisdiction over the absentee class members on the basis of 28 U.S.C. § 1367. The court found that all of the class claims are "inextricably factually intertwined" because they are all "premised upon a common course of conduct by Prudential . . . relat[ing] to the same alleged company wide development and implementation of the patently fraudulent sales techniques." Fairness Opinion, 962 F.Supp. at 501. Noting that § 1367 applies to both pendent parties and pendent claims, the district court concluded it had the discretion to exercise supplemental jurisdiction over the entire dispute and the proposed settlement on the basis of its initial federal question jurisdiction. The court also found it could exercise supplemental jurisdiction over the state claims on the basis of its diversity jurisdiction. *Id.* at 505.

Appellants dispute both of these asserted grounds for supplemental jurisdiction. They contend the federal claims of plaintiff Dorfner, the claims of persons with

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[28] The 1996 Amendment to 28 U.S.C. § 1332, which raised the amount-in-controversy requirement from $50,000 to $75,000, did not take affect until after the filing of the Second Amended Consolidated Complaint. *See* Pub.L. No. 104-317, § 205(b) (1996).

purely state law claims, and the panoply of "other" sales claims do not derive from a common nucleus of operative fact, and thus the district court cannot exercise supplemental jurisdiction based on its jurisdiction over plaintiffs' federal securities claims.[29] Johnson Brief at 4. Appellants also contest the district court's assertion of supplemental jurisdiction based on its initial diversity jurisdiction. They contend that, in order for the district court to exercise supplemental jurisdiction, each putative class member must meet the amount-in-controversy requirement of § 1332. Johnson Brief at 7-8 (citing *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973)). Finally, appellants argue the district court's application of 28 U.S.C. § 1367 to assert jurisdiction over the proposed class violates Article III.

The settling parties respond with two arguments. First, they claim the district court correctly exercised supplemental jurisdiction based on its original federal question jurisdiction because all class members' claims arise from the same case or controversy. Thus there is no need to address the question of the district court's diversity jurisdiction. In the alternative, they argue that appellants' reliance on *Zahn* is misplaced, and that § 1367 overruled *Zahn's* requirement that all class members meet the amount-in-controversy requirement of § 1332. Consequently, the court could properly exercise supplemental jurisdiction based on its original diversity jurisdiction.

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[29] They also argue that Dorfner could not be expected to bring both his federal claims and his purely state law claims in the same suit.

1. Federal Question Jurisdiction as a Basis for Supplemental Jurisdiction

None of the parties contest the district court's assertion of federal question jurisdiction "over [plaintiff] Dorfner's federal securities claims, and the federal securities claims of other similarly situated plaintiffs." Fairness Opinion, 962 F.Supp. at 500. Instead they focus their arguments on the court's exercise of supplemental jurisdiction.

Before enactment of § 1367, a district court could only exercise jurisdiction over claims which did not satisfy the requirements of §§ 1331 and 1332 by applying the principles of ancillary or pendent jurisdiction. The concept of pendent jurisdiction, as explained by the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), allowed a court to hear non-federal claims over which it did not have diversity jurisdiction provided those claims shared a "common nucleus of operative fact" with the claims that supported the court's original jurisdiction. But this extension of jurisdiction was permitted only when it would promote "judicial economy, convenience and fairness to litigants." 383 U.S. at 726, 86 S.Ct. 1130.

While pendent jurisdiction allowed district courts to hear additional, non-federal claims which were part of the same "case" as those claims within the court's original jurisdiction, the doctrine of ancillary jurisdiction allowed courts to hear claims brought against additional parties. Ancillary jurisdiction, however, was more limited than its counterpart. In *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978),

the Court held ancillary jurisdiction could not be asserted when to do so was contrary to the rule of complete diversity. Further, the Court found the doctrine of ancillary jurisdiction did not allow the addition of parties who were not within the court's original jurisdiction, even in cases in which the district court had exclusive federal jurisdiction. *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). But the *Finley* Court noted the cases addressing the scope of ancillary and pendent jurisdiction were not entirely consistent, and offered the possibility that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress." *Id.* at 556, 109 S.Ct. 2003.

Congress responded by passing the Judicial Improvements Act of 1990, which added § 1367 to the jurisdictional arsenal of the federal courts and essentially overruled *Finley*. Section 1367 combined the two concepts of pendent and ancillary jurisdiction under the rubric of "supplemental" jurisdiction, providing for jurisdiction "in any civil action of which the district courts have original jurisdiction" over "all other claims that are so related . . . that they form part of the same case or controversy under Article III." 28 U.S.C. 1367(a). The statute explicitly included "claims that involve the joinder or intervention of additional parties." *Id.*

The enactment of § 1367 has elicited a strong reaction from legal scholars. Some have argued that Congress intended § 1367 to be interpreted broadly, and hoped to encourage the federal courts to hear claims which might otherwise have fallen outside of their reach. *See* John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of*

1988 and 1990, 24 U.C. Davis L.Rev. 735, 766 (Spring 1991) ("By the juxtaposition of sections 1367(a) and 1367(c) Congress appears to have created a strong presumption in favor of the exercise of supplemental jurisdiction."); 2 Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, § 6.11, at 6-45 (3d ed. 1992) ("[T]here are multiple reasons to expect that the rulings of *Zahn v. International Paper Co.*, requiring allegations that each class member satisfied jurisdictional amount requirements in diversity actions, have been legislatively bypassed."). Others have felt that § 1367 is constrained by prior Supreme Court decisions, and does not expand the courts' jurisdictional grant. Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943, 960 n. 90 (Fall 1991) (acknowledging that while a facial construction of § 1367 would appear to overrule *Zahn*, "the legislative history was an attempt to correct the oversight"); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional And Statutory Analysis*, 24 Ariz. St. L.J. 849, 973 (Fall 1992) ("[Section] 1367 should be interpreted as effecting no change in the prior practice and continuing undisturbed the rule of *Zahn*."). Regardless of Congress's intent with respect to *Zahn*, it is clear that § 1367 does not abrogate the rule of law established in *Gibbs*, and thus any exercise of supplemental jurisdiction must meet the requirements of Article III's "case or controversy" standard. *See* H.R.Rep. No. 101-734 at n. 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 n. 15 (stating that § 1367(a) "codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v.*

Gibbs"); *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1505 (3d Cir.1996) ("The Supreme Court delineated the modern constitutional bounds of pendent [now referred to as supplemental] jurisdiction in *United Mine Workers v. Gibbs*."); Oakley, 24 U.C. Davis L.Rev. at 764 (noting that under § 1367, the district court's exercise of supplemental jurisdiction "extends to the limits of Article III, thus ratifying and incorporating the constitutional analysis of *United Mine Workers v. Gibbs*").

There is no dispute the district court had jurisdiction over the federal securities claims alleged in the Second Amended Consolidated Complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citing *Gully v. First National Bank*, 299 U.S. 109, 112-113, 57 S.Ct. 96, 81 L.Ed. 70 (1936)) ("The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."). It is equally clear that, under § 1367, the district court could exercise supplemental jurisdiction over any claims which were part of the same Article III "case or controversy" as the federal securities claims. Consequently, our analysis turns on whether the claims asserted in the Second Amended Consolidated Complaint meet the standard established in Gibbs.

Under Gibbs, three requirements must be met for a court to exercise supplemental jurisdiction:

> The federal claims must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive

> from a common nucleus of operative fact. But if considered without regard to their state or federal character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in the federal courts to hear the whole.

383 U.S. at 725, 86 S.Ct. 1130 (emphasis omitted) (footnote and internal citation omitted).

A district court may not assert supplemental jurisdiction over state claims that are totally unrelated to the federal claims that form the basis of the court's jurisdiction. *Lyon v. Whisman*, 45 F.3d 758, 761 (3d Cir.1995). In *Lyon*, the district court had original jurisdiction to hear claims under the Fair Labor Standards Act, and elected to exercise supplemental jurisdiction over state contract and tort claims. The federal claim involved the employer's failure to pay overtime wages, while the state claims related to a failure to pay certain bonuses. This Court ruled that the exercise of supplemental jurisdiction was inappropriate, because the only nexus between the state and federal claims was the employer/employee relationship, rather than the conduct underlying the claims.[30] *Id.* at 764.

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[30] The *Lyon* court found that "under any standard, the nexus between the federal and state claims in this case is inadequate" to support supplemental jurisdiction. 45 F.3d at 762. The court went on to note:

> Lyon's FLSA claim involved very narrow, well-defined factual issues about hours worked during particular weeks. The facts relevant to her state law contract and tort claims, which involved Whisman's alleged underpayment of a bonus and its refusal to pay the bonus if Lyon started looking for another job,

The Second Amended Consolidated Complaint alleges that Prudential engaged in a widespread scheme to defraud customers. As part of that scheme, Prudential allegedly used "false and misleading sales presentations, policy illustrations, marketing materials," and other information approved, prepared and disseminated by Prudential to its nationwide sales force. Second Amended Consolidated Complaint at 3. According to plaintiffs, certain actions taken by Prudential in furtherance of that scheme violated § 10(b)[31] and

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> were quite distinct. In these circumstances it is clear that there is so little overlap between the evidence relevant to the FLSA and state claims, that there is no "common nucleus of operative fact" justifying supplemental jurisdiction over the state law claims. In fact, it would be charitable to characterize the relationship of the federal and state claims as involving even a "loose" nexus.

Id. at 763.

[31] Section 10(b) of the Securities Exchange Act of 1934 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

§ 20(a)[32] of the Securities and Exchange Act. As noted, the district court agreed with the settling parties, finding that all of the class claims were "inextricably intertwined" because there was a common scheme to defraud.[33]

We agree. The Second Amended Consolidated Complaint clearly alleges that Prudential engaged in a common scheme to defraud. Each category of claims raised in the Complaint relied on the implementation of that scheme, the training of Prudential's agents in conformity with it, and the use of pre-approved materials to support it. While only one category of claims alleged in the Complaint involved violations of the federal securities laws, all of the claims derive from the same common scheme, and thus from the same "nucleus of operative fact." That

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[32] Section 20(a) of the Securities Exchange Act of 1934 provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a).

[33] Furthermore, many plaintiffs had more than one claim stemming from the conduct of Prudential's sales agents. For example, named plaintiff Nicholson alleged churning, vanishing premium and investment plan claims, while named plaintiff Dorfner alleged churning and vanishing premium claims. *See supra* note 11.

implementation of Prudential's scheme resulted in a variety of unlawful transactions does not negate the common basis they all shared. We recognize the need to scrutinize assertions of federal subject matter jurisdiction in these kinds of class actions where there are significant state law claims. But we believe the nexus between the federal and state claims is so close here that federal jurisdiction is appropriate. Consequently, we hold the district court properly exercised supplemental jurisdiction over the class members' state claims based on its federal question jurisdiction.

Of course, § 1367 does not permit courts to take jurisdiction over tangentially related claims. The issue is whether there is a "common nucleus of operative fact" and whether the claims are part of the "same case or controversy under Article III." Here the facts underlying the investment deception are so intertwined with the other misrepresentations and frauds that, given the allegations of the overall scheme, they have the same factual predicate, making extension of federal jurisdiction appropriate.

2. Diversity Jurisdiction as a Basis for Supplemental Jurisdiction

The district court also found that it had supplemental jurisdiction under § 1367 based on its original diversity jurisdiction over named plaintiffs' claims under § 1332. As noted, the named plaintiffs satisfy the prerequisites for diversity jurisdiction. None of the named plaintiffs is a citizen of the same state as any defendant, satisfying the complete diversity requirement, and each of the named

plaintiffs has alleged damages in excess of $50,000, satisfying the amount in-controversy requirement. The more perplexing question is whether the remaining class members must also satisfy the requirements of diversity jurisdiction in order for the court to exercise supplemental jurisdiction over their claims.

Before enactment of § 1367, absentee class members seeking to establish the court's subject matter jurisdiction based on diversity of citizenship were not subject to the same requirements as the class representatives. According to the Supreme Court, the complete diversity requirement did not apply to absentee class members, but was satisfied so long as the named plaintiffs were completely diverse from defendants. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 365-67, 41 S.Ct. 338, 65 L.Ed. 673 (1921). But the absentee class members were each subject to the same amount-in-controversy requirement as the named plaintiffs, and could not aggregate their claims in order to satisfy § 1332. *Zahn*, 414 U.S. at 301, 94 S.Ct. 505.

Although the complete diversity rule of *Supreme Tribe of Ben-Hur* remains intact, the passage of § 1367 has raised serious questions about the continuing viability of *Zahn*. On the one hand, it is generally conceded that the plain language of § 1367 states a different amount-in-controversy rule from that set forth in *Zahn*.[34] *See, e.g., Russ v.*

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[34] Section 1367 provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that

State Farm Mut. Auto. Ins. Co., 961 F.Supp. 808, 817-20 (E.D.Pa.1997). Section 1367(a) gives courts discretion to exercise supplemental jurisdiction in all cases where the original claim supporting federal jurisdiction and the additional claim are part of the same Article III case or

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are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiff under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367.

controversy, including those additional claims involving the joinder of parties. At the same time, § 1367(b) establishes certain exceptions to this permissive rule in cases where the court's original jurisdiction is based solely on diversity. In particular, § 1367(b) prohibits federal courts from exercising supplemental jurisdiction over persons made parties under Rules 14, 19, 20, and 24, unless those additional claims independently satisfy § 1332. Under the principle of *expressio unius est exclusio alterius*, Congress's failure to include Rule 23 among the restrictions in subsection (b) would seem to indicate Congress did not intend to restrict the district court's exercise of supplemental jurisdiction in class actions. In addition, *Zahn's* critics contend that, from a policy standpoint, the decision runs counter to *Supreme Tribe of Ben-Hur*. They argue that while the complete diversity requirement upholds the very essence of diversity jurisdiction, the amount-in-controversy requirement is merely an administrative concept designed to limit the caseload of the federal judiciary. Consequently, they contend it would make little sense to create an exception to complete diversity in the context of class actions but to continue requiring all class members to meet the amount-in-controversy requirement. *See Zahn*, 414 U.S. at 309, 94 S.Ct. 505 (Brennan, J. dissenting) ("Particularly in view of the constitutional background on which the statutory diversity requirements are written, it is difficult to understand why the practical approach the Court took in *Supreme Tribe of Ben-Hur* must

be abandoned where the purely statutory 'matter in controversy' requirement is concerned.").[35]

By contrast, others contend § 1367 was never intended to eliminate the amount-in-controversy requirement for absentee class members established in *Zahn*. This argument relies heavily on the legislative history of the statute, in particular the House Judicial Committee Report that explicitly states § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R.Rep. No. 101-734 at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 (footnote omitted). The footnote to this section of the Report specifically refers to *Supreme Tribe of Ben-Hur* and *Zahn*, and supports the argument that the complete diversity and amount-in-jurisdiction rules of those cases survive the enactment of § 1367. Additionally, the Report of the Federal Courts Study Committee urges Congress to "expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom that

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[35] It is interesting to note that one of the primary rationales for class actions is allowing access to the courts for parties whose individual claims are so small that it would be economically infeasible to pursue them individually. *See* 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 4.27 at 4-107 to 4-109 (3d ed.1992). Consequently, upholding *Zahn's* amount-in-controversy requirement would largely undercut this purpose.

plaintiff has a closely related state claim." Report of the Federal Courts Study Committee 47 (1990) (*quoted in Russ*, 961 F.Supp. at 815). The limited scope of the Committee's suggestion can be read as support for upholding the restrictions of *Zahn*.[36]

The cases addressing this issue reflect this difference of opinion. The only two appellate courts to examine this question have both found the language of the statute controlling, and concluded that § 1367 overrules *Zahn*. *See In re Abbott Laboratories*, 51 F.3d 524, 528 (5th Cir.1995); *Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928, 930 (7th Cir.1996). The *Abbott Laboratories* court reasoned that it could not "search legislative history for congressional intent unless [it found] the statute unclear or ambiguous," and that in the absence of such ambiguity "the statute is the sole repository of congressional intent." 51 F.3d at 528-29 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-71, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *West Virginia Univ. Hosps., Inc. v.*

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[36] The Federal Courts Study Committee Working Papers showed that the matter had come to the attention of the Committee. 1 Federal Courts Study Committee Working Papers and Subcommittee Reports 561 n. 33 ("From a policy standpoint, [*Zahn*] makes little sense, and we therefore recommend that Congress overrule it."). Nonetheless, the Committee did not adopt the proposal and, indeed, cautioned against reliance on the Working Papers. *See* Preface to Working Papers ("These [Working Papers] were valued background materials which the Committee determined should be published for general consideration whether or not the Committee agreed with their substantive proposals. . . . In no event should the [Working Papers] be construed as having been adopted by the Committee.").

Casey, 499 U.S. 83, 99-100, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991)). Because it found the plain language of the statute unambiguous, the court concluded that "under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives." *Id.* at 529.

Unlike the class action facing the court in *Abbott Laboratories*, the Court of Appeals for the Seventh Circuit addressed this question in the context of two plaintiffs seeking to join an additional claim that did not meet the amount-in-controversy requirement. *Stromberg*, 77 F.3d at 930. The *Stromberg* court also reasoned that "[w]hen text and legislative history disagree, the text controls," and allowed the exercise of supplemental jurisdiction in that instance. 77 F.3d at 931 (citing *In re Sinclair*, 870 F.2d 1340 (7th Cir.1989)).

Most of the district courts that have addressed this issue have concluded otherwise. These courts have relied primarily on the legislative history to find that *Zahn* is still good law. *See, e.g., Russ*, 961 F.Supp. at 817-20; *Crosby v. America Online, Inc.*, 967 F.Supp. 257, 263-64 (N.D.Ohio 1997); *Griffin v. Dana Point Condominium Ass'n*, 768 F.Supp. 1299, 1301-02 (N.D.Ill.1991). Judge Louis Pollak's opinion in *Russ*, while conceding that the plain language of the statute would appear to overrule *Zahn*, presents a persuasive analysis of the legislative history and the policy reasons supporting his conclusion that *Zahn* is unaffected by the enactment of the supplemental jurisdiction statute.

The district court here followed the reasoning of *Abbott Laboratories* and concluded the plain language of § 1367 overruled *Zahn*. Consequently, the district court found it also had supplemental jurisdiction over the non-federal claims of absentee class members based on its diversity jurisdiction over the claims of the named plaintiffs.

The question is by no means an easy one. From a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises. Yet there are strong countervailing arguments that, at least under the current jurisdictional statutes, such class actions may be beyond the reach of the federal courts.

Regardless of the relative strength of the competing arguments over *Zahn*'s continued viability, we need not enter the fray. Because we have found that the district court properly exercised supplemental jurisdiction over class members' non-federal claims based on its original federal question jurisdiction, we need not decide whether the district court properly found it had supplemental jurisdiction based on its exercise of diversity jurisdiction over the claims of the named plaintiffs. The continued viability of *Zahn* and its effect on class actions will undoubtedly be addressed in the near future, either by the Supreme Court or by Congress, and at present we need not resolve the issue.

B. *Personal Jurisdiction*

The district court also found it had personal jurisdiction over all members of the proposed class. We agree. In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). The combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class satisfy the due process requirements of the Fifth Amendment. Consequently, silence on the part of those receiving notice is construed as tacit consent to the court's jurisdiction. *Id.*; *see also Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 199 (3d Cir.1993).

The district court here directed that notice of the class action be sent to all persons who owned one or more Prudential insurance policies between 1982 and the present. Initially, we note the provision of individual notice to each class member is by no means typical of the notice provided in most class actions, and certainly qualifies as unprecedented. The notice provided here met the requirements for personal jurisdiction. It explained that each individual receiving notice was a member of the proposed class, and clearly set forth the procedure for opting out of the class. The notice also contained the proposed release, which explained that all claims would be waived if the individual did not elect to opt out of the class. Consequently, we find the members of the proposed class were adequately informed of their potential

claims against Prudential, and the district court had personal jurisdiction over those members of the putative class who did not timely opt out.[37]

C. *Article III*

Appellants also dispute the district court's finding that this case qualified as a "case or controversy" under Article III. Fairness Opinion, 962 F.Supp. at 505-06. Appellants contend that, "whether analyzed under the feigned case doctrine or as a failure of Article III standing," the inclusion of both injured and uninjured policyholders in the certified class violates the case or controversy requirement of Article III because the parties have not suffered an "injury in fact." Public Citizen Brief at 16. Appellants also contend the inclusion and release of claims arising out of not only the three primary activities complained of, but also based on "other improper sales practices," disqualifies the action as a case or controversy under Article III. *Id.* at 16-17. Amicus curiae Public Citizen further argues that the record is devoid of information concerning these other improper sales practices, that no plaintiff has claimed an injury as a result of them, and that there was never an intent to litigate them. Consequently, "there never has been any live controversy between Prudential and the 'other improper sales practices' class." *Id.* at 17. The district court addressed

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[37] Appellants have questioned whether the notice adequately described the category of "other improper sales practices" claims so as to inform members that they might have a valid, compensable claim against Prudential. We believe it did. *See* discussion *infra* § V.C.2.

appellants' contentions and found them to be without merit. Fairness Opinion, 962 F.Supp. at 506.

We agree with the district court. Article III requires that federal courts may only adjudicate an actual "case or controversy." As the district court noted, whether an action presents a "case or controversy" under Article III is determined vis-a-vis the named parties. *Id.* at 506 (citing *Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974)). "Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense." 1 *Newberg on Class Actions* § 2.05 at 2-29 (3d Ed.1992). The record in this case is replete with examples of the adversarial nature of these proceedings, and it is clear that all of the named representatives have a valid "case or controversy" with respect to Prudential's alleged fraudulent sales scheme. There is also ample evidence that each named party has suffered an "injury in fact" as a result of Prudential's sales practices and therefore has standing to bring suit. Thus, the named plaintiffs satisfy Article III. The absentee class members are not required to make a similar showing, because once the named parties have demonstrated they are properly before the court, "the issue [becomes] one of compliance with the provisions of Rule 23, not one of Article III standing." *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 122 (3d Cir.1985), *aff'd*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).

We also note that, with respect to appellants' "feigned case" argument, the notice and the ADR process here were designed to determine which members of the

class could demonstrate a compensable injury as a result of Prudential's allegedly deceptive practices. To require the named plaintiffs to determine beforehand which of the 8 million policyholders were deceived and provide notice to only those persons would eliminate the viability of the class action device.

We also disagree that the parties never intended to litigate the "other sales practices" claims. As discussed, those claims, along with the three categories of specific violations, were all intertwined as part of the common scheme allegedly employed by Prudential. If the parties litigated the churning, vanishing premium and investment plan claims, they would have litigated their "other sales practice" claims as well.

Based on the foregoing, we will affirm the district court's exercise of jurisdiction.

IV. CLASS CERTIFICATION

A. *Settlement-Only Class Certification*

Under the Federal Rules of Civil Procedure, a district court generally makes a determination whether to certify a class "as soon as practicable after the commencement of an action brought as a class action." Fed.R.Civ.P. 23(c)(1). This certification may be conditional, and may be modified as needed. *Id.* Although the initial complaint in this case was filed on October 24, 1995, the district court delayed consideration of the certification issue pending the outcome of the Task Force investigation.[38]

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[38] As noted above, the district court partially granted Prudential's motion to dismiss on May 10, 1996.

On October 28, 1996, the district court conditionally certified the proposed class for settlement purposes only. Reviewing the class action device historically, the Supreme Court noted that "[a]mong current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device. . . . all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes." *Amchem Products Inc. v. Windsor*, ___ U.S. ___, ___, 117 S.Ct. 2231, 2247, 138 L.Ed.2d 689 (1997) (citations omitted); *see also G.M. Trucks*, 55 F.3d at 786-800 (examining the arguments for and against the use of settlement classes). But drawing on Judge Edward Becker's comprehensive opinion in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir.1996),[39]

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[39] The proposed settlement in *Georgine* was the by-product of ongoing negotiation and litigation involving a group of asbestos manufacturers and a myriad of plaintiffs whose cases had been consolidated in the Eastern District of Pennsylvania by the Multidistrict Litigation Panel. Counsel for both sides negotiated separate settlements to resolve both the then-pending claims against the CCR and the inventory of unfiled claims held by plaintiffs' counsel. Once the extant cases were settled, the parties filed the *Georgine* class action on behalf of approximately 2 million individuals who had not previously filed lawsuits against the asbestos defendants, but who had been exposed to asbestos products produced by defendants. While some members of the class had suffered physical injuries as a result of their exposure, other members of the class were "exposure-only" plaintiffs who had not yet developed any asbestos-related illness. The parties simultaneously filed a complaint, an answer, a proposed settlement and a joint motion for conditional class certification. The district court granted the motion, and subsequently approved the settlement. On appeal, the *Georgine* court vacated the district court's opinion and remanded for decertification of the class, finding that the class did not satisfy the typicality, adequacy of representation,

the *Amchem* Court noted the special problems encountered with settlement classes. Although as a general matter it approved the certification of classes for settlement purposes only, the Supreme Court cautioned that the certification inquiry is still governed by Rule 23(a) and (b), and that "[f]ederal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted – that if a settlement is 'fair,' then certification is proper." *Amchem*, ___ U.S. at ___ – ___, 117 S.Ct. at 2248-49.

Consequently, a district court must first find a class satisfies the requirements of Rule 23, regardless whether it certifies the class for trial or for settlement. *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248 ("The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments – shorn of utility – in the settlement class context."); *G.M. Trucks*, 55 F.3d at 799-800 ("In sum, 'a class is a class is a class,' and a settlement class, if it is to qualify under Rule 23, must meet all of its requirements.").

The district court may take the proposed settlement into consideration when examining the question of

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predominance and superiority requirements of Rule 23. *Georgine*, 83 F.3d at 618. The Supreme Court affirmed. *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2244.

Throughout this opinion, we will distinguish between the opinions of this Court and the Supreme Court by referring to the Supreme Court's decision as *Amchem*, and referring to this Court's opinion as *Georgine*.

certification. *Amchem*, at ___, 117 S.Ct. at 2248.[40] In *Amchem*, the Supreme Court held "a district court [determining whether to certify a class for settlement purposes only] need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Id.* at ___, 117 S.Ct. at 2248. But at the same time the Court noted that "other specifications of the rule – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened, attention in the settlement context." *Id.* In particular, the Court emphasized the importance of applying the class certification requirements of Rules 23(a) and (b) separately from its fairness determination under Rule 23(e). The Court noted that "[i]f a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context." *Id.* at ___ – ___, 117 S.Ct. at 2249-50.[41] At the same time, the Court stressed the requirements found under Rule 23(a), in particular the stricture that "the representative parties will fairly and adequately protect the interests of the class." Indeed,

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[40] The district court did not have the benefit of the *Amchem* decision when it rendered its opinion, and did not take settlement into consideration when conducting its certification analysis.

[41] In his separate opinion concurring in part and dissenting in part, Justice Breyer, joined by Justice Stevens, questioned the consistency of the majority approach. "If the majority means that these pre-settlement questions are what matters, then how does it reconcile its statement with its basic conclusion that 'settlement is relevant' to class certification." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2254.

the key to *Amchem* appears to be the careful inquiry into adequacy of representation. *Id.* at ___, 117 S.Ct. at 2248 ("Subdivisions (a) and (b) [of Rule 23] focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.")

With this standard in mind, we will review the district court's analysis of the Rule 23 certification criteria.

B. *Class Certification under Rule 23*

"Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiff's and counsel's ability to fairly and adequately protect class interests." *G.M. Trucks*, 55 F.3d at 799. In order to be certified, a class must satisfy the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[42] If the Rule 23(a) criteria are satisfied, the court must also find that the class fits within one of the three categories

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[42] Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

of class actions defined in Rule 23(b).[43] In this instance the parties sought to certify the class under Rule 23(b)(3).[44] In order to pass muster under Rule 23(b)(3), the district court must determine that common questions

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[43] Rule 23(b)(1) authorizes certification in cases where separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Rule 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B). Rule 23(b)(2) authorizes class actions seeking declaratory or injunctive relief, for example civil rights cases alleging class based discrimination.

[44] Rule 23(b)(3) provides:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> * * *
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

of law or fact predominate and that the class action mechanism is the superior method for adjudicating the case. The requirements of subsections (a) and (b) are designed to insure that a proposed class has "sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248; *see also Hassine v. Jeffes*, 846 F.2d 169, 177 n. 4 (3d Cir.1988) (" '[C]ommonality' like 'numerosity' evaluates the sufficiency of the class itself, and 'typicality' like 'adequacy of representation' evaluates the sufficiency of the named plaintiff. . . . "). As noted, these class certification requirements are to be determined independently from the court's determination of the "fairness" of the proposed settlement under Rule 23(e).[45] *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248 (Rule 23(e) "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b).").

1. The Rule 23(a) Criteria

a. Numerosity

The court must find that the class is "so numerous that joinder of all members is impracticable."

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[45] Rule 23(e) provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

Fed.R.Civ.P. 23(e).

Fed.R.Civ.P.23(a)(1). No one has challenged the district court's finding that the proposed class satisfies the numerosity requirement. Indeed, the proposed class consists of more than 8 million present and former policyholders.

b. Commonality

The commonality prong of Rule 23(a) asks whether "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2).[46] The district court found the proposed class easily satisfied the commonality requirement, citing several common factual and legal issues which the class members would need to establish in order to prove Prudential's liability.[47] Fairness Opinion, 962 F.Supp. at

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[46] Courts frequently examine the Rule 23(a) requirement of commonality in conjunction with Rule 23(b)(3)'s "predominance" standard, reasoning that the "predominance requirement incorporates the commonality requirement." *Georgine*, 83 F.3d at 626; 1 *Newberg on Class Actions* § 3.13, at 3-71. Although the district court followed this approach and examined the predominance and commonality requirements together, appellants have not questioned the court's finding that the proposed class satisfies this element of Rule 23(a).

[47] The district court found that plaintiffs would need to establish the following common factual issues at trial:

- Prudential's common course of conduct;
- Prudential's development of the sales presentations and materials, and artificial inflation and maintenance of dividend scales;
- the sale of replacement and vanishing premium policies by material omission;

512. The district court also noted that the MDL Transfer Order recognized that the transferred actions "involve common questions of fact . . . involv[ing] allegations that deceptive life insurance sales practices occurred or were encouraged as a[sic] result of some larger scheme or schemes organized by Prudential." *Id.* (quoting August 3, 1995 Transfer Order at 1-2). Finally, the court found Prudential had asserted affirmative defenses which were

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- the misrepresentation of policies as investment or retirement plans;
- the failure to train or supervise agents;
- Prudential's unwillingness to prevent deceptive sales practices; and
- Prudential's scienter.

Fairness Opinion, 962 F.Supp. at 512.

The district court also found that plaintiffs would need to establish the following common legal issues at trial:

- whether policyholder reliance could be presumed;
- whether Prudential's offer to finance a policyholder's purchase of a policy constitutes an enforceable financing contract distinct from the policy itself;
- whether Prudential breached the financing contract;
- whether Prudential breached an obligation of good faith and fair dealing;
- whether constructive trust principles apply to premiums received as a result of deceptive sales practices;
- whether compensatory claims can be effectively quantified on a class wide basis; and
- whether punitive damages should be imposed.

Id.

common to all class members, and independently would satisfy the predominance requirement. *Id.* at 512-13.[48]

We believe the court's finding that the proposed class satisfied the commonality requirement was within its sound discretion. A finding of commonality does not require that all class members share identical claims, and indeed "factual differences among the claims of the putative class members do not defeat certification." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir.1994) (citing *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir.1985)).[49] "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Id.* As the district court found, the allegations in the Second Amended Consolidated Complaint raise numerous issues which all members of the class would need to demonstrate in order to succeed at

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[48] The court also cited the following as examples of issues common to all class members: Prudential's fraudulent concealment of its misrepresentations; the use of substantially similar, and sometimes identical, oral and written misrepresentations by Prudential agents in furtherance of its fraudulent scheme; the required use of pre-approved written marketing materials; and the fact that Prudential trained its agents to use these fraudulent sales techniques. Fairness Opinion, 962 F.Supp. at 513-16.

[49] Krell objects to the district court's reference to *Baby Neal*, complaining that the court was inappropriately applying the Rule 23(b)(2) standard for injunctive relief in a Rule 23(b)(3) class action. The objection is clearly without merit. The district court applied *Baby Neal* in the context of its Rule 23(a) "commonality" analysis, a factor applicable whether the class action is brought under Rule 23(b)(2) or (b)(3).

trial. Consequently, the proposed class satisfies Rule 23(a)(2).

c. Typicality

The district court found the claims of the class representatives were typical of the class as a whole. First, the court noted all of the named plaintiffs have alleged either churning, vanishing premium, or investment plan claims, or some combination of the three. Second, it relied on the "prominent guiding thread through all plaintiffs' claims – Prudential's scheme to defraud" to support its conclusion that the claims of the named plaintiffs are typical of the class as a whole. Fairness Opinion, 962 F.Supp. at 518. The court rejected the argument that "the class fails for lack of typicality because no class representative claims to have been injured by 'other improper sales practices.' " *Id.* The court reasoned that the "class members injured by 'other fraudulent sales practices' have suffered the same injury – they are victims of Prudential's deception – and have suffered the same generic type of harm – they have economic damages – as the named plaintiffs," thereby satisfying the typicality requirement. *Id.* at 519 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

On appeal, Krell reasserts his argument that the inclusion of the "other claims" defeats a finding of typicality. In particular, Krell contends the named plaintiffs' claims cannot be representative of the class because the "other claims" are not identified. Krell Brief at 29; *see also* Public Citizen Brief at 13-16. Additionally, Krell contends the court failed to consider the variations among the laws

of the 50 states, making its typicality analysis inadequate.[50] Amicus Public Citizen, relying on *Falcon*, argues plaintiffs must "show that the plaintiff class ha[s] been injured in the same manner as ha[ve] the named representative[s]." Public Citizen Brief at 15 (emphasis omitted).

"The concepts of commonality and typicality are broadly defined and tend to merge." *Baby Neal*, 43 F.3d at 56 (citing 7A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 1764, at 247 (1986)). The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals. *Id.* at 57 ("The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented."); 1 *Newberg on Class Actions*, § 3.13. In this respect the commonality and typicality requirements both seek to ensure that the interests of the absentees will be adequately represented. *Falcon*, 457 U.S. at 157 n. 13, 102 S.Ct. 2364 n. 13. However, "neither of these requirements mandates that all putative class members share identical claims." *Baby Neal*, 43 F.3d at 56; *Hassine v. Jeffes*, 846 F.2d at 176-77; *Weiss v. York Hosp.*, 745

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[50] Krell also argues the court improperly evaluated the typicality requirement because it merely presumed the factual and legal elements of named plaintiffs' claims were aligned with the claims of absentee class members. Krell's claim that the district court presumed typicality simply ignores the findings contained in the district court's opinion.

F.2d 786, 809 (3d Cir.1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). In addition, "factual differences among the claims of the putative class members do not defeat certification." *Baby Neal*, 43 F.3d at 56.

We believe the district court's typicality analysis is correct. The named plaintiffs, as well as the members of the proposed class, all have claims arising from the fraudulent scheme perpetrated by Prudential. That overarching scheme is the linchpin of the Second Amended Consolidated Complaint, regardless whether each class member alleges a churning claim, a vanishing premium claim, an investment plan claim, or some other injury falling within the category of "other sales" claims. "Commentators have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Baby Neal*, 43 F.3d at 58. Consequently, the factual distinctions among and between the named plaintiffs and the 8 million putative class members do not defeat a finding of typicality. "[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories" or where the claim arises from the same practice or course of conduct. *Id.*

This conclusion is further buttressed by the Supreme Court's holding in *Falcon*. The Supreme Court reversed certification of a class of Mexican-Americans who were challenging their employers hiring and promotion

decisions on typicality grounds.[51] *Falcon*, 457 U.S. at 157-59, 102 S.Ct. 2364. Krell relies on *Falcon* for the proposition that "across-the-board" classes do not satisfy Rule 23. Krell Brief at 27-28. We disagree. *Falcon* did not strike down "across-the-board" classes *per se*, and, in fact, it agreed "with the proposition underlying the across-the-board rule – that racial discrimination is by definition class discrimination." *Falcon*, 457 U.S. at 157, 102 S.Ct. 2364. The Court nonetheless reversed the class certification because the district court had improperly presumed that Falcon's claims were typical of the class claims. In particular, the Court emphasized that Falcon's claim was based on the theory of disparate treatment, while the class claims relied on the theory of disparate impact. Consequently, Falcon would need to "prove much more than the validity of his own claim" in order to prove the claims of the absentee class members, and thus his claims were not typical of the class. *Id.* at 158, 102 S.Ct. 2364.

The present case is readily distinguishable. Unlike the plaintiff in *Falcon*, the named plaintiffs here have not relied on allegations that they were singled out and defrauded by Prudential. They have instead alleged that they suffered harm as the result of the same company-wide conduct that injured the absentee class members.

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[51] *Falcon* involved a Mexican-American employee who was denied a promotion, allegedly based on his national origin. After obtaining a right-to-sue letter from the EEOC, Falcon commenced a class action under Title VII of the Civil Rights Act of 1964, alleging discrimination against Mexican-Americans with respect to promotion. The class, however, was comprised of all Mexican-American employees and Mexican-Americans who had been denied employment.

The various forms which their injuries may take do not negate a finding of typicality, provided the cause of those injuries is some common wrong. *Baby Neal*, 43 F.3d at 58 (citing *Falcon*, 457 U.S. at 157-59, 102 S.Ct. 2364) ("Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice."). In this instance, the alleged common scheme provides an appropriate basis for a finding of typicality. Since all members of the class would need to demonstrate the existence of this scheme, their interests are sufficiently aligned that the class representatives can be expected to adequately pursue the interests of the absentee class members. *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248 (Rule 23 asks "whether a proposed class has sufficient unity so that absent class members can fairly be bound by decisions of class representatives").

d. Adequacy of Representation

The final Rule 23(a) prerequisite encompasses two distinct inquiries designed to protect the interests of absentee class members. First, the adequacy of representation inquiry "tests the qualifications of the counsel to represent the class." *G.M. Trucks*, 55 F.3d at 800. Second, it "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2250. The district court found that both class counsel and the named plaintiffs satisfied these tests.

With respect to class counsel, the court found that plaintiffs' counsel were highly competent and experienced class action attorneys, and had pursued the interests of the class vigorously. Fairness Opinion, 962 F.Supp. at 519-20. With respect to the class representatives, the court found named plaintiffs' interest in proving Prudential's "knowledge and orchestration of the scheme to defraud" and their "interest in obtaining relief commensurate with individual injury," as well as punitive damages, demonstrates that "there are no disparate interests to impair plaintiffs' incentive to prosecute fully all aspects of their claims against Prudential." *Id.* at 521.

Krell contests the district court's analysis on several grounds. First, Krell disputes the district court's finding that class counsel adequately served the interests of the class. In particular, Krell argues that class counsel failed to take adequate discovery, and that an improper "clear sailing" fee agreement between class counsel and Prudential created an impermissible conflict of interest.[52] Krell Brief at 19-21, 51-53.

Second, Krell contends the inclusion of the category of "other claims" defeats a finding of adequate representation. Krell argues because policyholders have an equity interest in any "surplus" of Prudential, the expansion of the class to include policyholders with unidentified "other claims," whose interests were "adverse to those

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[52] The court specifically noted that the fee agreement negotiated with Prudential subsequent to the negotiation of the Proposed Settlement did not undermine the adequacy of class counsel's representation. Fairness Opinion, 962 F.Supp. at 519; *see also infra* § VI.C.1.

with asserted claims," created a detriment on behalf of the "other" policyholders for the benefit of those with asserted claims. According to Krell, this conflict destroys the adequacy of named plaintiffs' representation.

Third, Krell repeats his argument that the court's failure to consider the variations among the laws of the 50 states demonstrates that there was no adequate protection of the claims of absentees. In particular, Krell claims there was a conflict between class members with replacement claims and those without, so that the district court should have created a subclass of replacement claimants.[53] Finally, both Krell and Public Citizen argue the proposed class improperly includes a subset of "futures" claimants, thereby running afoul of *Amchem*.

We believe the district court exercised its sound discretion when it found class counsel and the named plaintiffs adequately represent the class. First, we believe class counsel vigorously pursued this class action. Both the uncapped nature of the proposed settlement and the "unprecedented" outreach program indicate that class counsel and the named plaintiffs have attempted to serve the best interests of the class as a whole. Further, we agree with the district court's finding that the attorneys' fee arrangement between class counsel and Prudential did not affect the adequacy of representation. *See infra* § VI.C.1.

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[53] The district court explicitly rejected this argument. Fairness Opinion, 962 F.Supp. at 522. For a more detailed discussion of Krell's replacement claims, *see infra* § V.A.4.

Second, we also agree with the district court that the named plaintiffs adequately represent the interests of the absentee class members. As discussed, the crux of this class action is the allegation that Prudential engaged in a scheme to defraud policyholders by means of company-wide deceptive sales practices. The named parties, like the members of the class, would need to establish this scheme in order to succeed on any of the claims in the Second Amended Consolidated Complaint. Even those class members with "other" claims share the common task of demonstrating the existence and implementation of this scheme. Consequently, we believe the proposed class satisfies the adequacy of representation requirement of Rule 23(a).

We also reject the argument that the class as constituted included persons who are currently unaware of their injury, and that this "future" class is barred under *Amchem*. *Amchem*, of course, found the proposed class did not meet the adequacy of representation standard because the interests of those with present injuries differed from those with "futures" claims. *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2251 (finding that the economic interest of the currently injured claimants "tugs against the interest of the exposure-only plaintiffs"). But *Amchem* is easily distinguished on its facts. Unlike the "exposure-only" plaintiffs in *Amchem*, the class members here need not wait to determine if they have been harmed by Prudential's fraudulent sales practices. There is no "future" manifestation of injury, because any injury suffered by a member of the class has already occurred. Having received notice of the pending class action and the availability of relief, members of the class can determine

whether they have been victims of Prudential's fraud, either through a review of their records or by calling the toll-free number established by the settling parties. Consequently, the district court exercised its sound discretion in finding the proposed class meets the adequacy of representation requirement of Rule 23(a)(4).

2. The Rule 23(b) Criteria

In order to certify an opt-out class under Rule 23(b)(3) the district court must make two additional findings: predominance and superiority. Issues common to the class must predominate over individual issues, and the class action device must be superior to other means of handling the litigation. The district court found both requirements were satisfied.

a. Predominance

The Supreme Court's recent decision in *Amchem* addressed the application of the predominance prong to "settlement only" classes. Although the Court made clear that consideration of the proposed settlement was proper when making a decision on class certification, it also placed limits on the weight to be accorded to the settlement. In particular, *Amchem* rejected the idea that the potential benefits of settlement are relevant to the predominance inquiry. According to the Court, the predominance "inquiry trains on the legal or factual questions that qualify each member's case as a genuine controversy, questions that preexist any settlement." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2249. The court noted the "claims and

defenses" relevant to both the predominance test and the Rule 23(a)(4) adequacy of representation inquiry "refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." ___ U.S. at ___ n. 18, 117 S.Ct. at 2249 n. 18 (quoting *Diamond v. Charles*, 476 U.S. 54, 76-77, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) (O'Connor, J. concurring in part and concurring in judgment)).

In its predominance determination, the court focused primarily on plaintiffs' allegation that Prudential engaged in a common course of conduct by which it defrauded class members, and concluded that "[w]here many purchasers have been defrauded over time by similar misrepresentations, or by a common scheme to which alleged non-disclosures related, courts have found that the purchasers have a common interest in determining whether the defendant's course of conduct is actionable." Fairness Opinion, 962 F.Supp. at 511 (citations omitted).

The district court also rejected the argument that claimants' need to demonstrate reliance destroyed predominance, reasoning that "reliance is an issue secondary to establishing the fact of defendant's liability." *Id.* at 516 (citing 1 *Newberg* § 4.26 at 4-104) ("Challenges based on . . . reliance have usually been rejected and will not bar predominance satisfaction because [reliance pertains] to the right of a class member to recover in contrast to underlying common issues of the defendant's liability."). Additionally, the court noted that "most of the plaintiffs' claims do not even involve a reliance element," including their claims for breach of contract, breach of implied obligation of good faith and fair dealing, negligence,

negligent training and supervision, and unjust enrichment. *Id.* Finally, the court found that, because "plaintiffs' fraud-based claims stem largely from misleading omissions," reliance can be presumed. *Id.*

The district court also distinguished this case from *Georgine*. First, the court reasoned that "Prudential's alleged intentional use of the fraudulent sales tactics provides the 'single central issue' lacking" in *Georgine*. *Id.* at 511 n. 45. Whereas *Georgine* involved a variety of claims encompassing scores of individual issues, a trial in this instance would be focused on Prudential management's conduct. *Id.* Second, the court noted the class here is comprised of persons who purchased one type of product (life insurance policies) from one company, in contrast to the *Georgine* class members who were exposed to different asbestos-containing products manufactured by different companies. Finally, the district court noted the class here lacked "futures" plaintiffs, because "class members are readily identifiable and have already suffered injury by the purchase of a product that was misrepresented." *Id.*

As the Supreme Court noted in *Amchem*, "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. . . . [e]ven mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2250 (citing Adv. Comm. Notes, 28 U.S.C.App., p. 697). This case, involving a common scheme to defraud millions of life insurance policy holders, falls within that category. The district court's opinion sets forth a litany of common issues

which the class must demonstrate in order to prevail. *See supra* § IV.B.1 and n. 47-48. While individual questions may arise during the course of this litigation, we agree with the district court that the presence of individual questions does not *per se* rule out a finding of predominance. In particular, the "presence of individual questions as to the reliance of each investor does not mean that the common questions of law and fact do not predominate." *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.1985).

Krell contends the district court did not conduct a proper analysis under Rule 23(b)(3), and instead "presumed" predominance by finding the central issue in this case was nationwide deceptive conduct by Prudential's management. We disagree. A review of the district court's fairness opinion belies the contention that it merely presumed predominance. *See* Fairness Opinion, 962 F.Supp. at 510-17. The district court's finding that common issues predominated in this case was within its sound discretion, was supported by the record, and was amply demonstrated in its opinion.

Krell also reasserts his argument that the class here suffers the same defects as the class of asbestos plaintiffs in *Amchem*. We find the district court's analysis of this comparison convincing. The two cases are markedly different, and easily distinguished. The *Amchem* class failed the predominance inquiry because of the disparate questions facing class members, based in part on their differing levels of exposure, their differing medical histories, and the presence of exacerbating conditions such as smoking. Of course, the complexity of a case alleging physical injury as a result of asbestos exposure differs greatly from a case alleging economic injury as a result of

deceptive sales practices. The elements of proof are less difficult when the vagaries of medical testimony and scientific expertise are removed from consideration. Furthermore, the *Amchem* class was further undermined by the schism between the differing medical needs of currently injured class members and exposure-only or "futures" claimants. As noted, there is no "futures" class in this case.

We also reject Krell's contention that predominance is defeated because the class claims are subject to the laws of the fifty states. Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit. This Court has affirmed a class certification based on a "creditable showing, which apparently satisfied the district court, that class certification [did] not present insuperable obstacles" relating to variances in state law. *See In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3d Cir.1986).[54] In this instance Krell has failed to demonstrate that the differences in applicable state law were sufficient to foreclose a similar approach.[55] In support of class certification, plaintiffs compiled "a series of

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[54] While we reached a different conclusion in *Georgine*, our decision there turned on our belief that the case "could not be broken into anywhere near that small a number of patterns." 83 F.3d at 627 n. 13.

[55] In addition, Krell's concern is addressed by the fact that "the ADR scoring procedures specifically incorporate state replacement regulations." Fairness Opinion, 962 F.Supp. at 550 n. 79.

charts setting forth comprehensive analyses of the various states' laws potentially applicable to their common law claims." Fairness Opinion, 962 F.Supp. at 525. The court concluded that the "elements of these common law claims are substantially similar and any differences fall into a limited number of predictable patterns." *Id.* The district court "considered the choice of law issues that confront[ed] the Court and conclude[d] that these choice of law issues [did] not render this class action unmanageable." *Id.* We agree.

b. Superiority

Rule 23(b)(3) sets out several factors relevant to the superiority inquiry.[56] The district court addressed these factors and found the class action mechanism was superior to other possible means of adjudicating this case. First, the court examined the relatively modest size of individual claims and the sheer volume of those claims in the aggregate, and concluded a class action presented the

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[56] Rule 23(b)(3) lists the following factors for consideration by the courts:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

"only rational avenue of redress for many class members." *Id.* at 523. Second, the court reasoned the relatively small number of individual suits pending against Prudential indicated that individual policyholders lacked a compelling interest to control the prosecution of their own claims, and at the same time represented a potentially great strain on judicial resources. Third, the court found it was appropriate to litigate the case in New Jersey, Prudential's principal place of business. Finally, the district court determined that the case, while challenging, would not present insurmountable case management problems if it were tried.[57] *Id.* at 525.

Krell objects to the finding of superiority, claiming the district court erred by only comparing the nationwide class with the prospect of individual proceedings, without considering the possibility of subclasses and without allowing Krell to develop the subclass issue.

The superiority requirement asks the court "to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *Georgine*, 83 F.3d at 632 (citing *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 757 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d

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[57] While we believe the district court correctly analyzed whether application of the laws of the fifty states would be manageable, we note this analysis, depending on the facts in each case, may no longer be necessary in the context of settlement-only class certification. *See Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

125 (1974)). We believe the court's superiority determination was within its sound discretion. With respect to Krell's subclass argument, the district court found no conflict between replacement and nonreplacement claimants. Fairness Opinion, 962 F.Supp. at 522. We agree. As discussed *infra* at § V.A.4., Krell has not demonstrated that replacement claimants differ from other class members so as to require the creation of a subclass. Because the replacement claimants did not require specialized or distinct treatment, the court's failure to create a separate subclass for those claimants, as well as its superiority determination, was not an abuse of discretion.[58]

C. *Conclusion*

Based on our review of the prerequisites of Rule 23(a) and 23(b)(3), we believe the "proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248. Consequently, we will affirm the district court's certification of the class.

V. THE FAIRNESS OF THE PROPOSED SETTLEMENT

Even if it has satisfied the requirements for certification under Rule 23, a class action cannot be settled without the approval of the court and a determination that the

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[58] The district court expressly left open the possibility that it would create subclasses if they became necessary. Fairness Opinion, 962 F.Supp. at 525.

proposed settlement is "fair, reasonable and adequate."[59] *G.M. Trucks*, 55 F.3d at 785. "Rule 23(e) imposes on the trial judge the duty of protecting absentees, which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims." *Id.* at 805 (citations omitted).

In deciding the fairness of a proposed settlement, we have said that "[t]he evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.* at 806 (citations omitted). At the same time, we have noted that cases such as this, where the parties simultaneously seek certification and settlement approval, require "courts to be even more scrupulous than usual" when they examine the fairness of the proposed settlement. *Id.* at 805. This heightened standard is designed to ensure that class counsel has demonstrated "sustained advocacy" throughout the course of the proceedings and has protected the interests of all class members. *Id.* at 806.

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir.1975). Because of the district court's proximity to the parties and to the nuances of the litigation, we accord great weight to the court's factual findings. *Bell Atlantic*

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[59] Both Rule 23(e) and Rule 23(c) require that notice of the proposed settlement be given to all members of the class as directed by the court. For a discussion of the notice provided, see discussion *infra* § V.C.2.

Corp. v. Bolger, 2 F.3d 1304, 1305-6 (3d Cir.1993) (citing *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir.1971)).

As the district court recognized, our decision in *Girsh* sets out appropriate factors to be considered when determining the fairness of a proposed settlement. Those factors are:

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . .

Girsh, 521 F.2d at 157 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974)) (the "*Girsh* factors"). The court examined each of these factors and found "the Proposed Settlement is indeed fair, reasonable, and adequate and should be approved." Fairness Opinion, 962 F.Supp. at 534.

In addition to the *Girsh* analysis, the district court offered other reasons for its conclusion that the settlement was fair and reasonable. Describing the proposed settlement as "exceptional," the court noted the settlement's structure was based on the class action settlements approved in *Willson v. New York Life Ins. Co.*, No.

94-127804, 1995 N.Y. Misc. LEXIS 652 (N.Y.Sup.Ct. Feb. 1, 1996), *aff'd*, 228 A.D.2d 368, 644 N.Y.S.2d 617 (1st Dept.), and *Michaels v. Pheonix Home Life Ins. Co.*, No. 95-5318, 1997 N.Y. Misc. LEXIS 171 (N.Y.Sup.Ct. Jan. 3, 1997), both of which received the praise of "[c]ourts, academic and industry experts, and various independent organizations." Fairness Opinion, 962 F.Supp. at 535. The court also relied on the expertise of the insurance regulators from the fifty states and the District of Columbia, all of whom endorsed the settlement.

The court found the terms of the settlement "benefit [ ] the class enormously," emphasizing the uncapped nature of the relief, the fairness of the ADR process, and the availability of Basic Claim Relief to those class members who either elect not to participate in the ADR process or who cannot demonstrate they have a compensable claim. The court found this relief was enhanced by the inclusion of "Additional Remediation Amounts," which it described as the "punitive damage counterpart to the Proposed Settlement," and by Prudential's agreement to pay all attorneys' fees and costs associated with the settlement. *Id.* at 535-36. Finally, the court emphasized the settlement provided class members the opportunity to file claims immediately after court approval of the settlement, rather than waiting through what no doubt would be protracted litigation. *Id.* at 536.

Krell raises several challenges to the district court's fairness determination.[60] First, Krell claims the district

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[60] Prudential contends that nearly "[e]very argument Krell makes is based on th[e] mistaken premise that his 'replacement

court applied several of the *Girsh* factors improperly, and in some cases not at all, and that it erred by not creating a separate subclass to address replacement claims. Krell Brief at 43-50. Second, he contends the district court's fairness determination violated the McCarran-Ferguson Act and the Rules Enabling Act by altering the substantive contractual and statutory insurance rights of the class. *Id.* at 36-40. Finally, Krell alleges the certification and fairness proceedings lacked due process. *Id.* at 40-42.

A. The *Girsh* Factors

Although Krell has not directly challenged the court's analysis with respect to each of the nine *Girsh* factors, we will examine each of them in turn.

1. The complexity and duration of the litigation

Citing the myriad complex legal and factual issues which would arise at trial, the district court found the "anticipated complexity, costs, and time necessary to try this case greatly substantiate the fairness of the settlement." Fairness Opinion, 962 F.Supp. at 536. The court found that litigation would require expensive and time

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claims' were stronger than the misrepresentation claims of the other Class Members." Prudential Brief at 41 & n. 10. As a result, Prudential argues, all but one of the objections to the settlement's fairness are "felled by Krell's error of law." *Id.* We do not agree that Krell's arguments can be dismissed so easily, and will address Krell's replacement claim objections in the context of his other arguments.

consuming discovery, would necessitate the use of several expert witnesses, and would not be completed for years. Consequently, the court concluded this factor weighed in favor of settlement.

We agree. Examining the sheer magnitude of the proposed settlement class as well as the complexity of the issues raised, we conclude the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court. The prospect of such a massive undertaking clearly counsels in favor of settlement.[61]

2. The reaction of the class to the settlement

This factor attempts to gauge whether members of the class support the settlement. Although the response rate in a 23(b)(3) class action is relevant to the fairness determination, *see, e.g., Bell Atlantic,* 2 F.3d at 1313 n. 15 (3d Cir., 1993); *Shlensky v. Dorsey,* 574 F.2d 131, 148 (3d Cir.1978), "a combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *G.M. Trucks,* 55 F.3d at 812 (citation omitted).

The district court found that, of the 8 million policyholders to whom Prudential sent the class notice, approximately 19,000 policyholders or 0.2 per cent of the

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[61] We also note that no parties have objected to this portion of the district court's analysis.

class opted out.[62] The court also noted that approximately 300 policyholders filed objections to the settlement. The court found the small percentage of opt outs and objectors was "truly insignificant," and noted that the "most vociferous objectors to the Proposed Settlement are a handful of litigants represented by counsel in cases that compete with or overlap the claims asserted in the Second Amended Complaint." Fairness Opinion, 962 F.Supp. at 537. Consequently, the court concluded the limited number of objections filed also weighed in favor of approving the settlement. *Id.* at 537-38.

We see no abuse of discretion. While we do not read too much into the low rate of response, we believe the district court properly analyzed this factor.[63]

3. The stage of the proceedings and amount of discovery completed

The parties must have an "adequate appreciation of the merits of the case before negotiating." *G.M. Trucks*, 55 F.3d at 813. To ensure that a proposed settlement is the product of informed negotiations, there should be an

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[62] The court found that approximately 700 of those who opted out wrote "to indicate they do not feel they were misled in the purchase of their insurance, are satisfied with their policies, and do not want to participate in the action against Prudential." Fairness Opinion, 962 F.Supp. at 537 n. 61.

[63] Krell argues that the low response rate was the result of inadequate notice. We disagree. As discussed *infra* § V.C.2, we believe the class notice adequately apprised the class members of their right to enter an appearance, file objections, or opt out of the proposed class, and provided a detailed explanation of the procedures for doing so.

inquiry into the type and amount of discovery the parties have undertaken. Krell contends that class counsel's discovery was insufficient to support the proposed settlement, claiming that Lead Counsel's pre-settlement discovery consisted only of 70 boxes of documents received in August 1996 pursuant to informal letter requests, and a number of meetings with Prudential's chairman, Arthur Ryan. Krell questions how Lead Counsel could have been in "second stage settlement negotiations" before receiving Prudential's production of over 1 million documents, videotapes, audio tapes and computer tapes in mid-August. Finally, Krell contends there was no vigorous, adversarial discovery because "virtually all of Prudential's discovery obligations" were stayed between October 1995 and September 10, 1996, and the parties didn't agree on a free exchange of information until August 20, 1996, only a few weeks before the proposed settlement was announced.

The district court found that "counsel for plaintiffs and Prudential did not commence serious settlement discussions until 18 months of vigorous litigation had transpired," noting the parties had filed and argued a multitude of motions, including consolidation motions, jurisdictional motions, motions to stay competing class actions, case management motions, and Prudential's motion to dismiss under F.R.C.P. 12(b)(6). Fairness Opinion, 962 F.Supp. at 538 n. 62. In addition to its in-court efforts, the district court concluded that class counsel's pursuit of discovery also supported the settlement. The

court found class counsel reviewed a multitude of documents provided by Prudential,[64] conducted its own interviews with hundreds of current and former Prudential employees, took twenty depositions, and had access to all of the materials collected by the Task Force. *Id.* at 541. The district court also found class counsel took sufficient time to review the discovery materials it collected, noting that class counsel refused to discuss settlement on two separate occasions because it believed it needed further discovery. *Id.* (citing Weiss Aff. ¶¶ 49, 101-02.) Finally, the court found class counsels' "use of informal discovery was especially appropriate in this case because the Court stayed plaintiffs' right to formal discovery for many months, and because informal discovery could provide the information that plaintiffs needed." *Id.* at 542. Based on the foregoing, the district court concluded "the volume and substance of Class Counsel's knowledge of this case are unquestionably adequate to support this settlement." *Id.* at 541. We see no error here.

4. The risks of establishing liability and damages

The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement. Examining plaintiffs' ability to establish liability and damages at trial, the court concluded "the risks of

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[64] This discovery included over 1 million documents, 160 computer diskettes, 500 audio and video tapes. Fairness Opinion, 962 F.Supp. at 541.

establishing liability weigh in favor of approving the settlement." *Id.* at 540.

We believe the district court properly examined the risks faced by the putative class. The court found plaintiffs would face a difficult burden at trial demonstrating, *inter alia,* (1) class members were deceived by Prudential's written disclosures and illustrations; (2) their contract claims were not barred by the parol evidence rule because they conflict with the unambiguous language in the insurance contracts; (3) the necessary reliance to support their federal securities claims; and (4) their federal securities claims were not barred by the one year statute of limitations and the three year statute of repose. *Id.* at 539. As further evidence of the barriers facing plaintiffs, the district court took notice of a similar life insurance sales practice case in Alabama state court in which the judge overturned a substantial jury verdict against Prudential. *Id.* (citing *Key v. Prudential Ins. Co. of America,* Civ. No. 93-479 (Al.Cir.Ct. Dec. 28, 1995)). We believe the district court offered substantial reasons for its findings.

a. Replacement Claims

Krell argues the district court failed to consider separately the likelihood of success at trial for those class members who alleged "replacement claims," contending those claims require a lesser degree of proof and may be established by an objective review of the documents in Prudential's files. Both Prudential and Lead Counsel contend that "replacement policyholders faced similar burdens to those of other Class Members in establishing

liability and damages against Prudential."[65] Prudential Brief at 35.

The district court did not believe that "replacement claims" are easier to prove and therefore required separate consideration. Fairness Opinion, 962 F.Supp. at 522. We agree. Krell offers no authority or analysis to support this blanket assertion. In addition, the findings of the Multi-State Task Force undermine Krell's argument.

The primary focus of the Multi-State Task Force was the practice known as "churning" or "twisting," which it defined as "the sale of any policy based upon incomplete or misleading comparisons." Task Force Report at 35. According to the Multi-State Task Force Report, the transactions most frequently the subject of churning or twisting complaints were financed sales and abbreviated payment plans. Replacement transactions are a subcategory of financed sales in which at least 25% of an existing policy's value is used to fund the purchase of a new policy. *Id.* (citing the current NAIC Replacement Life Insurance and Annuities Model regulation, adopted in 1984).

The Task Force Report makes clear that "none of these types of sales, financed, replacement or abbreviated

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[65] Prudential also notes that Ohio state courts have found that a violation of state replacement laws does not give rise to a private cause of action. Prudential Brief at 36 (citing *Springfield Impregnators, Inc. v. Ohio State Life Ins. Co.*, No. C.A. 3090, 1994 WL 95219 at *9 (Ohio App. Mar. 23, 1994); *Strack v. Westfield Companies*, 33 Ohio App.3d 336, 515 N.E.2d 1005, 1007-08 (Ohio App.1986)).

pay, is in violation of the replacement regulation if properly done." *Id.* at 36 (emphasis omitted). It also notes that, during the late 1970s and early 1980's, the previous industry-wide disinclination for replacement sales began to give way. In 1978, for example, the National Association of Insurance Commissioners modified its model replacement regulations to reflect the growing acceptance of replacement sales, provided those sales were accompanied by necessary information and disclosure to allow consumers to "make an informed choice."[66] *Id.* at 39-40.

Turning to its examination of Prudential, the Task Force acknowledged its goal was "to determine whether during the sale of new policies, those involving financing or replacement, consumers were adequately advised of the potential failings of the new policies or the funding basis on which they were sold." *Id.* at 45. The Report notes that although all of the required disclosure forms may have been completed and filed by Prudential, "[o]ne must look beyond the required forms to determine whether or not presentations were accurate and not misleading." *Id.* In its discussion of the remediation protocol, the Task Force explained "the documentation received from Prudential did not always support the consumer's assertion," and consequently "[w]hat was or was not agreed upon at the time of sale became a question of

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[66] The Task Force also noted that, in 1985, the Federal Trade Commission acknowledged that many older insurance policies were "candidates for replacement." Task Force Report at 42-3 (quoting Michael P. Lynch and Robert J. Mackay, *Life Insurance Products and Consumer Information*, Staff Report, Bureau of Economics, Federal Trade Commission, Washington, D.C. (November 1985)).

fact." *Id.* at 189; *see also id.* at 191 (noting that while "some replacements may have been appropriate . . . misrepresentation is never appropriate," and thus "the challenge is to distinguish appropriate replacement activity.")

Consequently, it appears that misrepresentation, rather than compliance with bookkeeping requirements, was the primary concern of the Task Force examination of Prudential's replacement sales. As the Task Force Report states, it is incorrect "to assume that in any and every case where a replacement was not identified or the regulatory requirements were not met, the policyholder did not understand the transaction or that it was not properly explained." *Id.* at 17. We also find it significant that the state insurance regulators who crafted the initial Task Force Report did not incorporate a lesser burden of proof or otherwise distinguish "replacement claims" from other types of claims.[67] Consequently, we believe the district

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[67] We note that even if the different claims alleged by plaintiffs require proof of different elements to establish liability, those differences are adequately addressed during the ADR process. ADR claims will be examined using a set of criteria specific to the type of claim filed. For example, the evidentiary considerations for a churning claim include misstatements by a Prudential agent concerning the applicable interest rate on a policy loan, the policyholder's annual income, and the use of blank, signed disbursement forms. *Prudential Alternative Dispute Resolution Guidelines,* Stipulation of Settlement, Ex. B, at 17. Considerations for a vanishing premium claim include whether the policyholder was advised to disregard notices from Prudential, whether the policyholder made a "significant financial decision" in reliance on the belief that premium payments would cease, and whether the policyholder received altered or unclear sales materials from an agent. *Id.* at 26-27.

court properly considered the role of replacement claims when analyzing the fourth and fifth *Girsh* factors.[68]

5. The risks of maintaining the class action through trial

Under Rule 23, a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable. *In re School Asbestos Litigation*, 789 F.2d at 1011 (3d Cir.1986); *G.M. Trucks*, 55 F.3d at 815. In this instance, the district court concluded that although "this case is manageable as a class action and [ ] the class action device is the most appropriate means to adjudicate this controversy, as the case evolves, maintaining the class action may become unworkable" and require decertification. Fairness Opinion, 962 F.Supp. at 540. The court also noted Prudential had sought to preserve its objections to class certification, and would likely contest certification if the case proceeded to trial. Consequently, the court concluded that there was a risk the case might eventually be decertified, all of which weighed in favor of settlement.

Although we agree with the district court's analysis and find there was some risk of decertification which supports settlement, we pause to comment on the application of this factor in "settlement-only" class actions

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[68] The district court also noted that "[n]one of the four states that objected to the Proposed Settlement have ever prohibited financed insurance sales and three of the four did not regulate in any respect financed insurance sales for great portions of the Class Period." Fairness Opinion, 962 F.Supp. at 549 n. 77.

following the Supreme Court's decision in *Amchem*. Because the district court always possesses the authority to decertify or modify a class that proves unmanageable, examination of this factor in the standard class action would appear to be perfunctory. There will always be a "risk" or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement. The test becomes even more "toothless" after *Amchem*. The Supreme Court in *Amchem* held a district court could take settlement into consideration when deciding whether to certify a class, and that, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." ___ U.S. at ___, 117 S.Ct. at 2248. It would seem, therefore, that after *Amchem* the manageability inquiry in settlement-only class actions may not be significant.

6. The ability of the defendants to withstand a greater judgment

The district court found "Prudential's ability to withstand a greater judgment is a matter of concern."[69] Fairness Opinion, 962 F.Supp. at 540. Noting that the

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[69] Prudential argued that consideration of this factor was unnecessary because of the uncapped nature of the relief. The district court rejected this claim, noting that while the compensatory relief was uncapped, the "punitive damages" component of the settlement-the Additional Remediation Amount – was limited, and thus the district court was obligated to examine this factor.

settlement was valued between $1 billion and $2 billion, the court found a larger judgment could negatively impact Prudential's declining credit rating.[70] *Id.* The court also expressed concern that, because Prudential is a mutual insurer, non-class member policyholders could conceivably be adversely affected by an excessive settlement in the form of lower dividends. *Id.*

Krell claims the district court erred by finding that Prudential could not withstand a greater judgment because "neither Lead Counsel nor Prudential submitted any reliable evidence of the true value of the ADR relief." Krell Brief at 50. Krell speculates that even the $410 million minimum is inaccurate because it does not account for "profits, if any" generated by Basic Claim Relief.

We see no error here. As the district court noted, the value of the proposed settlement is difficult to determine because both the compensatory relief available under the ADR and the additional relief available through Basic Claim Relief are uncapped. The parties' experts offered valuations between $1 and $2 billion, with an absolute minimum of $410 million. While these numbers are imprecise, they are a sufficient basis for the district court to decide whether Prudential could withstand a greater judgment. In addition, Prudential's credit rating during the course of the litigation may be an appropriate indicator, among others, for the court's consideration, and its decline would support the court's analysis.

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[70] The court found that Prudential's credit rating had already declined during the course of the litigation. Fairness Opinion, 962 F.Supp. at 540.

7. The range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation

The last two *Girsh* factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. In order to assess the reasonableness of a proposed settlement seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *G.M. Trucks*, 55 F.3d at 806 (quoting Manual for Complex Litigation 2d § 30.44, at 252). On appeal, Krell argues the district court declined to address this issue, instead finding the analysis unnecessary because all injured policyholders would receive full compensatory relief.

Krell has mischaracterized the district court's opinion. The district court applied the final two *Girsh* factors, although it did not attempt to reduce its analysis to a concrete formula. The district court found that calculating the best possible recovery for the class in the aggregate would be "exceedingly speculative," and in this instance such a calculation was unnecessary because the reasonableness of the settlement could be fairly judged. The court instead examined the nature of the settlement and the range of possible outcomes for those participating in either the ADR process or Basic Claim Relief, and concluded that "an individual's recovery exceeds the value of the best possible recovery discounted by the risks of litigation." Fairness Opinion, 962 F.Supp. at 540.

For example, the court found class members who have clear claims against Prudential will receive scores of "3" and will "receive a choice between full rescissionary or compensatory relief plus interest." Thus they will receive full compensation without paying attorneys fees and without undue delay.[71] The court concluded this relief "is not only fair, it is exceptional." *Id.* at 540-41. Those class members who received a score of "2" – where the evidence on balance supports the claim – would receive 50% of their damages without having to pay litigation costs or fees, an award the court concluded was equivalent to what the claimant would have received at trial. *Id.* at 541 ("The 50% award plus 100% interest is equivalent to a full award minus litigation costs, attorneys' fees, and the price of delay."). The court also found the settlement was fair for those receiving a score of "1" in the ADR process and for those electing Basic Claim Relief – those who would not have had a claim or not elected to bring one – because the Basic Claim Relief recovery is greater than what they would have gotten at trial.[72] *Id.*

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[71] In response, Krell contends that the court's belief that full compensatory relief is available relies on the flawed "assumption that 100% of the wrongfully replaced policyholders will understand the notice *and* form the requisite 'belief' *and* complete the 16 page proof of claim form and thereafter prevail in ADR." Krell Brief at 45. But Krell ignores the fact that any claim, whether brought at trial or under the ADR process, will require evidence of deceptive conduct in order to support liability.

[72] The district court also took notice of the procedural safeguards contained in the ADR process, including the four tier review process designed to ensure an accurate and fair scoring of class members' claims. *See discussion supra* § I.B.1.

We believe the district court adequately addressed these factors and agree its examination "accounts appropriately for the nuances of this Proposed Settlement." *Id.* at 535 n. 58. As the court noted, both the structure of the settlement and the uncapped nature of the relief provided make it difficult to determine accurately the actual value of the settlement. Consequently, the traditional calculus suggested by the Manual for Complex Litigation 2d and adopted by this Court in *G.M. Trucks* cannot be applied to this case. But we cannot find the district court abused its discretion when it found that the remedies available under the proposed settlement provided extraordinary relief. When balanced against the best possible recovery and the risks of taking this case to trial, these remedies weighed in favor of the proposed settlement.

It is worth noting that since *Girsh* was decided in 1975, there has been a sea-change in the nature of class actions, especially with respect to mass torts. In this regard, it may be useful to expand the traditional *Girsh* factors to include, when appropriate, these factors among others: the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; whether class or subclass

members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.[73] Of these factors, the only one relevant here is the

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[73] *See* Edward H. Cooper, Mass Torts Model, prepared for the Conference On Mass Torts, Mass Torts Working Group, Philadelphia, PA (May 1998).

Other related factors that also may be relevant to this inquiry are discussed by Judge William Schwarzer in his article, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L.Rev. 837, 843-44 (May 1995). The factors suggested by Judge Schwarzer include:

> (1) Whether the prerequisites set forth in subdivisions (a) and (b) [of Rule 23] have been met;
>
> (2) Whether the class definition is appropriate and fair, taking into account among other things whether it is consistent with the purpose for which the class is certified, whether it may be overinclusive or underinclusive, and whether division into subclasses may be necessary or advisable;
>
> (3) Whether persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants;
>
> (4) Whether notice to members of the class is adequate, taking into account the ability of persons to understand the notice and its significance to them;
>
> (5) Whether the representation of members of the class is adequate, taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants;
>
> (6) Whether opt-out rights are adequate to fairly protect interests of class members;

fairness and reasonableness of the ADR procedure. *See also* discussion *supra* § V.D.

B. *Other Objections*

1. The Rules Enabling Act and the McCarran-Ferguson Act

Krell argues the proposed settlement violates the Rules Enabling Act[74] and the McCarran-Ferguson Act[75]

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(7) Whether provisions for attorneys' fees are reasonable, taking into account the value and amount of services rendered and the risks assumed;

(8) Whether the settlement will have significant effects on parties in other actions pending in state or federal courts;

(9) Whether the settlement will have significant effects on potential claims of class members for injury or loss arising out of the same or related occurrences but excluded from the settlement;

(10) Whether the compensation for loss and damage provided by the settlement is within the range of reason, taking into account the balance of costs to defendant and benefits to class members; and

(11) Whether the claims process under the settlement is likely to be fair and equitable in its operation.

80 Cornell L.Rev. at 843-44.

[74] The Rules Enabling Act grants the Supreme Court the "power to prescribe general rules of practice and procedure." 28 U.S.C. § 2072(a). The Act further provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

[75] The McCarran-Ferguson Act provides "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the

because it "would alter policyholders' past and future substantive contractual and statutory insurance rights." Krell Brief at 36. The district court rejected both arguments. First, the court found the McCarran-Ferguson Act does not apply to an agreement between private parties. Fairness Opinion, 962 F.Supp. at 561. Second, the court found approval of a settlement under Rule 23 "merely recognizes the parties' voluntary compromise of their rights" and does not itself affect their substantive state law rights.[76] *Id.* at 561-62. For the reasons outlined by the district court, we agree the proposed settlement in this case does not violate either the McCarran-Ferguson Act or the Rules Enabling Act.[77]

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business of insurance." 15 U.S.C. § 1012(b). Krell claims the Federal Rules of Civil Procedure constitute an Act of Congress for purposes of the McCarran-Ferguson Act. Krell further contends the proposed settlement "relieves Prudential of compliance with state insurance laws" which regulate the form and content of documents used to sell insurance or modify existing insurance contracts. Consequently, Krell reasons that the approval of the class action settlement under Rule 23 must violate the McCarran-Ferguson Act.

[76] For a discussion of whether settlements of class actions under Rule 23 violate the Rules Enabling Act, *see* Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 Ariz. L.Rev. 615 (Summer 1997) (responding to arguments that the proposed inclusion of a "settlement-only" class in Rule 23 violates the Rules Enabling Act); *but see* Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of MassTort Settlements Negotiated Under Federal Rule 23*, 39 Ariz. L.Rev. 461 (Summer 1997).

[77] In support of its contention, Krell argues the sale of insurance under the Basic Claim Relief and the modification of existing contracts by the incorporation of the release and ADR

2. Failure to Allow Discovery

Krell alleges the district court deprived him of fundamental due process by denying him the opportunity to take necessary discovery. Krell Brief at 40-42. Krell contends additional discovery was essential because class counsel's own discovery was inadequate, and the district court's denial of Krell's requests for settlement and fee

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provision in all contracts since 1982 violates state laws regulating the form and content of insurance contracts. Krell further contends the class certification and settlement notices would not pass muster under state laws requiring that material used to advertise new insurance sales or modify insurance contracts not be misleading, because the class notice omits material facts, including: (a) the nature of the "other sales" claims; (b) the district court's finding that the jury value of each class member's claim could exceed $50,000; and (c) the indirect payment of Lead Counsel's fees by the class members. Finally, Krell contends that the settlement violates state laws barring mandatory arbitration of claims.

Prudential and Lead Counsel respond by noting that the insurance regulators for all 50 states and the District of Columbia have endorsed the settlement, and that the requirements of state insurance laws have been incorporated in the ADR scoring system. They also respond that: (a) the settlement agreement and class notice are not insurance contracts or policy forms and therefore need not meet state requirements for form, content and readability; (b) the district court found that the Settlement and Class Notice are excluded from the NAIC definition of advertising; and (c) the ADR is not "mandatory arbitration" but rather constitutes part of the settlement.

We agree. The settlement does not violate applicable state law.

related discovery[78] resulted in an erroneous assessment of the fairness of the settlement.

Krell complains his discovery attempts were hampered by the court order requiring all discovery requests be served on Prudential through Lead Counsel. According to Krell, Lead Counsel refused Krell's requests both prior and subsequent to signing the settlement agreement in September 1996, and excluded him from the "free exchange" of documents. Krell also requested cross-examination of affiants supporting the settlement, depositions from the named plaintiffs with respect to jurisdiction and adequacy of representation, and other document discovery.[79]

Objectors are "entitled to an opportunity to develop a record in support of [their] contentions by means of cross-examination and argument to the court." *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 833 (3d Cir.1973). There is no dispute Krell was given the opportunity to present his arguments to the court during the fairness hearing. In addition, the district court found Krell had ample opportunity to avail himself of the substantial discovery provided to Lead Counsel but failed to do so, and that additional discovery was unnecessary because Krell focused primarily on legal issues. Fairness Opinion, 962 F.Supp. at 563.

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[78] Discovery concerns relating to attorneys' fees will be addressed separately. *See infra* § VI.C.

[79] The district court suggested that alternative methods might be available to test the veracity of the affidavits.

We believe the district court acted well within its discretion here. Faced with the prospect of immense discovery requests, the district court attempted to exert some control over the discovery process. Krell cannot impute to the court his own failure to avail himself of the opportunity to review the discovery in this case.

C. *"Other Sales Claims"*

The final issue we address with respect to fairness relates to the category of "other sales claims." Krell raises two arguments in opposition to this broad category of claims. First, Krell contends that the "other claims" were improperly added at the last minute to secure an all-encompassing release for Prudential. Second, Krell contends the notice provided under the settlement did not adequately explain the category to absentee members, and consequently millions of policyholders would inadvertently waive their right to recover for Prudential's fraudulent acts.

1. The Alleged Expansion of the Class

According to Krell, the "class definition was at the last minute expanded to release nearly 8 million additional policyholders not included in the class pled only 3 days earlier." Krell Brief at 4.[80] In addition to the previously-noted ramifications of this "expansion" with

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[80] Krell also argues that the proposed class here is an "across the board" sales practice class, and that the Supreme Court has "rejected the creation of an 'across the board' racial discrimination class because its overbreadth posed serious unfairness to absent class members bound by the judgment."

respect to the Rule 23 certification prerequisites, Krell also contends the release of these claims is improper because it exceeds the scope of the class complaint.

Prudential and Lead Counsel counter that the certified class is actually smaller than the "putative class defined in plaintiffs' initial pleadings" and that the Task Force remediation plan also included an "other claims" category. As Lead Counsel explains, plaintiffs have contended "from the outset that Prudential's common course of deceptive conduct extended beyond the churning, vanishing premium, and investment sales tactics and permeated its product design, agent training and oversight, sales activities, and dividend, expense and investment practices." Lead Counsel Brief at 20. The settling parties maintain that, even if such claims were not included in the Second Amended Consolidated Complaint, those claims could still be released because they arose from the conduct alleged in the Complaint.

The district court held the release was not unfairly broad, finding it generally corresponded with the allegations in the Second Amended Consolidated Complaint. The court also found that "releases may include all claims, including unpleaded claims that arise out of the same conduct alleged in the case."[81] Fairness Opinion,

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Krell Brief at 28-29 (citing *Falcon*, 457 U.S. at 161, 102 S.Ct. 2364). As discussed earlier, Krell misreads the Supreme Court's decision in *Falcon*. *See supra* n. 51 and accompanying text.

[81] The district court also rejected Krell's objection to the scope of the release on the grounds that class members could simply have opted out of the class. While we agree with the statement as a factual matter, it does not address Krell's

962 F.Supp. at 558 (citing *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1563 (3d Cir.), *cert. denied*, 513 U.S. 986, 115 S.Ct. 480, 130 L.Ed.2d 393 (1994); *Sandler Assocs., L.P. v. Bellsouth Corp.*, 818 F.Supp. 695, 704-05 (D.Del.1993), *aff'd*, 26 F.3d 123 (3d Cir.1994)).

The crux of the plaintiffs' complaint was that Prudential engaged in a common scheme of deceptive sales practices. Although the Second Amended Consolidated Complaint specifically lists three types of deceptive sales claims – the churning, vanishing premium and investment plan claims – other allegations address conduct which supports the common scheme theory and which does not fall neatly within the three enumerated categories. *See supra* note 11. Therefore, we agree with the district court the "other claims" were properly released.[82] While it is essential to protect the interests of absentee class members, we believe the claims of the absentees here are adequately incorporated in the terms of the

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concern. The court's line of reasoning would render any objection meritless, and consequently we reject it.

[82] "[I]t is widely recognized that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment." *Grimes*, 17 F.3d at 1563; *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287-88 (9th Cir.), *cert. denied*, 506 U.S. 953, 113 S.Ct. 408, 121 L.Ed.2d 333 (1992) (noting that the weight of authority holds that a federal court may release claims which are not in the complaint provided they are based on the "same factual predicate"). As we noted in *Grimes*, "[t]his rule of law serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements that 'prevent relitigation of settled questions at the core of a class action.' " 17 F.3d at 1563 (quoting *TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir.1982)).

settlement. The category of "other claims" are part and parcel of the "common scheme" which underlies plaintiffs' entire case, and are separately addressed in the procedural guidelines which forms the basis for the ADR process. Finally, the settling parties have represented that the settlement "does not release unknown claims relating to the servicing or administration of class members' policies," but is limited to claims relating to the actual sale of insurance policies.[83] Lead Counsel Brief at 62-63. Consequently, we believe the "other claims" were appropriately included in the release.

2. Adequacy of Class Notice

Rule 23 of the Federal Rules of Civil Procedure contains two distinct notice provisions. Rule 23(c)(2) requires notice be given to all potential members of a Rule 23(b)(3) class informing them of the existence of the class action, the requirements for opting out of the class and/or entering an appearance with the court, and the applicability of any final judgment to all members who do not opt out of the class.[84] Rule 23(e) requires all members of the class be

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[83] Although the release provides that class members waive certain state law protections against the waiver of claims through general releases, that waiver provision is limited to claims arising out of Prudential's "insurance sales practices." Stipulation of Settlement at 36. Of course, we express no opinion of the validity of the waiver of any state law protections.

[84] Rule 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the

notified of the terms of any proposed settlement.[85] The Rule 23(e) notice is designed to summarize the litigation and the settlement and "to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." 2 *Newberg on Class Actions* § 8.32 at 8-109.

In this instance, the parties prepared a joint notice, combining the information required by Rules 23(c)(2) and 23(e). The district court's October 28, 1996 order required the settling parties to mail individual notice[86] to the last

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> circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

Fed.R.Civ.P. 23(c)(2).

[85] Rule 23(e) provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

Fed.R.Civ.P. 23(e).

[86] The individual notice provided a description of the litigation, the settlement class, and the terms of the proposed settlement, including the relief available. It set out the information regarding the fairness hearing, including the date of the hearing, the opportunity for class members to appear at the hearing, and the procedure for filing objections with the

known address of the over 8 million present and former policyholders who comprised the putative class.[87] In addition, the Order required the parties to publish notice in the national editions of *The New York Times, The Wall Street Journal, USA Today* and *The Newark Star Ledger*.[88] Prudential went even further, publishing notice in the largest circulating newspaper in each of the fifty states and the District of Columbia. Fairness Opinion, 962 F.Supp. at 495. The notices were published over a three day period, from November 20, 1996 until November 22, 1996.[89]

The district court described the notice and outreach program as unparalleled and found "the comprehensive notice program in this case far exceeded the requirements of Rule 23 and due process." *Id.* at 526. The district court

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court. The notice also explained the consequences for class members who remain in the class and provided the full text of the release. Finally, the notice provided class members with the toll-free 800 number established by Prudential to address class member concerns.

[87] The Stipulation of Settlement also provided the parties would remail any returned notices containing a forwarding address, and retain an independent research firm to determine a current address for any returned notices that did not contain a forwarding address. Stipulation of Settlement § G.3.

[88] The publication notice described the settlement class and provided information regarding, *inter alia*, the hearing, the deadline for opting out or entering an appearance, and the consequences of opting out or remaining in the class.

[89] On January 6, 1997, the district court postponed the fairness hearing from January 21 until February 24, 1997. Although not required to do so, the district court ordered the parties to provide additional notice to all class members notifying them of the postponement.

also examined and rejected various objections to the form and content of the notice. *Id.* at 528-34.

We agree with the district court's assessment of the scope of the outreach program.[90] Providing individual notice to over 8 million class members is a daunting task, and no doubt an expensive one. In addition, the combination of individual and publication notice, combined with the unsolicited news coverage the settlement received, greatly increased the possibility that Prudential will ultimately compensate a greater number of injured policyholders than would otherwise have been possible.[91] The parties also provided additional notices to the class, each designed to update the parties as to their rights and obligations under the settlement.[92]

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[90] We note that, in addition to the outreach program implemented by the settling parties, several states conducted there [sic] own outreach programs to supplement the notice provided under the settlement. For example, the California Department of Insurance ran a series of television and radio advertisements during the three weeks preceding the June 1, 1997 claim filing deadline. *Prudential v. Florida*, No. 97-5264 (3d Cir. May 22, 1997), slip op. at 6.

[91] The district court took judicial notice of the news coverage received by the settlement, including wire service articles published in various state, local and trade newspapers. Fairness Opinion, 962 F.Supp. at 496.

[92] For example, following the court's approval of the settlement, the parties provided additional notice to those class members who initially excluded themselves from the class. The notice explained that several enhancements had been made to the original settlement remediation plan as a result of negotiations with various states, and provided an election form with which the class members could indicate their decision to rejoin the class and elect either the ADR process or Basic Claim

We agree with the district court that the notice provided all of the required information concerning the class members' right and obligations under the settlement. It detailed the procedures for opting out, entering an appearance, and filing objections, and notified the policyholders that if they did not opt out of the class they would be bound by the settlement if approved. It explained the ADR process and Basic Claim Relief available to the class, provided the text of the release, and provided notification that all related documents were available for public inspection. Finally, it explained the nature of the claims covered under the settlement, and provided an 800 number through which class members could obtain information and make further inquiries. The fact that approximately 1.8 million inquiries have already been processed through the 800 number supports the conclusion that the class notice was effective.

The only legitimate concern raised with respect to the notice provided relates to the category of "other claims." After a careful review of the record, we hold the notice provided with respect to the category of "other claims" provided sufficient information to apprise the class of the scope of the allegations against Prudential. While this catch-all category is by its nature difficult to describe, we believe the class notice makes clear that additional claims which do not fit neatly into one of the other three categories may nonetheless be remedied through the ADR process.

Relief. A similar notice was provided to the rest of the class, extending the date for electing the ADR process or Basic Claim Relief until June 1, 1997.

The third page of the cover letter to the class notice specifically sets forth the four categories of sales claims – financed insurance, abbreviated payment, investment plan, and "other improper sales practices." The types of relief available for each of the four categories of claims are clearly listed on pages 10-11 of the Notice of Class Action, Proposed Settlement, Settlement Hearing And Right To Appear.[93] The four categories of claims are also listed in the question-and-answer pamphlet included with the Class Notice. Compared to the first three categories of claims, which require some understanding of insurance policies, the catch-all category of "other improper sales practices" is arguably easier for the uninformed layman to comprehend, and may in fact encourage class members to respond to the Class Notice.

Consequently, we believe the notice provided to the absentee class members in this case supports the district court's finding that the settlement is fair and reasonable.

D. *Conclusion*

As we have noted, a review of the Girsh factors strongly supports the district court's conclusion that the proposed settlement is fair and reasonable. In addition, the parties have fully satisfied the notice requirements of

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[93] Under the category of "other claims," the notice explains that "[i]f evidence shows other improper life insurance sales practices, you may be remedied through the cancellation of your policy with a refund of some or all of the premiums you paid, including interest in some cases, or the issuance of a substitute product purchased with the amount otherwise available for refund." Class Notice at 11.

Rule 23, and provided the class with both individual and publication notice regarding the terms of the settlement. There are also other facets of the settlement which counsel in favor of its approval.

First, we are impressed with the nature and extent of the relief provided under the settlement. The ADR process provides an efficient and individually tailored approach to the remediation of claims. Rather than offering 8 million class members a small refund or a coupon towards the purchase of other policies (which we believe would have failed the fairness evaluation), the ADR process responds to the individual claims of the class and provides compensation based on the harm they have suffered. As a result, the potential class recovery is uncapped, a fact which weighs strongly in favor of the settlement.

Second, we are also impressed with the procedural safeguards created by the settlement. The four tier review process, in which the first and third levels of review are conducted by Prudential employees and the second and fourth levels are conducted by independent reviewers selected by class counsel, provide assurance that the ADR process will accurately assess and compensate the claims of injured class members.

Third, we are mindful of the external indicia of fairness which attach to this settlement. In particular, we are cognizant that the original framework of this settlement resulted from the efforts of the Multi-State Task Force. The involvement of the various state insurance regulators, with their vast experience and expertise, provides great support in favor of the fairness of the settlement. In

addition, we are impressed by the seal of approval this settlement has received from the insurance regulators of each of the 50 states and the District of Columbia.

Fourth, that Prudential will bear all administrative costs associated with the remediation process and will pay class counsel's fees and costs weighs in favor of the settlement. By agreeing to cover these expenses, Prudential has ensured that the administrative and legal costs of the settlement will not diminish the class recovery.

Based on the foregoing, we conclude that the district court's finding that the proposed settlement was fair, reasonable and adequate was well within its sound discretion.

VI. ATTORNEYS' FEES

A. *The Fee Agreement*

The settling parties addressed attorneys' fees in § K of the Stipulation of Settlement filed October 28, 1996. Under the settlement, Lead Counsel would request $90 million in attorneys' fees from the district court, a request Prudential agreed not to oppose.[94] The full amount, as well as certain administrative costs associated with the

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[94] Section K.1. of the Proposed Settlement Agreement states:

> Lead Counsel agrees to make, and the Defendants agree not to oppose, an application for an award of Attorney's Fees in the Centralized Proceeding not to exceed a total of $90 million (the "Total Fees"). Additionally, Class Members will not be required to pay any portion of the Attorneys' Fees.

Stipulation of Settlement § K.1.

settlement plan, would be paid entirely by Prudential.[95] Stipulation of Settlement § K.4. The fee arrangement was designed so that payment of class counsel's fees and expenses would not "directly or indirectly reduce, limit or modify the remedies provided in the ADR process or Basic Claim Relief." *Id.* The Stipulation of Settlement also created a timetable for payment. Prudential would pay $45 million of the attorneys' fees plus expenses within five days of the district court's approval of the settlement, the remaining fees payable after the final disposition of any appeals.[96] *Id.* at § K.2.

On November 22, 1996, Lead Counsel submitted an application for attorneys' fees in conformity with § K. Several class members, among them Krell, filed objections

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[95] These costs included the publication, printing and mailing costs of various class notices; post-office box rental costs; the costs of establishing and maintaining the 800 telephone number established under the settlement; the costs of processing the exclusion requests and Election Forms; and all administrative costs associated with both the ADR Process and Basic Claim Relief, including the fees paid to claim evaluators and Appeals Committee members.

[96] Lead Counsel was responsible for the allocation and distribution of the fee award among the 25 law firms representing plaintiffs, Stipulation of Settlement ¶ K.2, and consequently the court need not undertake the difficult task of assessing counsels' relative contributions. *See* Dennis E. Curtis & Judith Resnik, *Contingency Fees In Mass Torts: Access, Risk, And The Provision Of Legal Services When Layers Of Lawyers Work For Individuals And Collectives of Clients*, 47 DePaul L.Rev. 425, 448-49 (Winter 1998) (noting the difficulty of "assessing the value of contributions of a multitude of attorneys to a particular outcome").

to the award. As the district court noted, no state insurance commissioner opposed the fee petition. *In re Prudential Ins. Co. of America Sales Practices Litigation*, 962 F.Supp. 572, 575 (D.N.J.1997) ("Fee Opinion"). Advocating the propriety of the proposed fee, Lead Counsel contended the remedies established under the Proposed Settlement were analogous to a "common fund" and, consequently, the size of the fee award should be determined as a percentage of the class members' total recovery. In order to establish the value of the settlement, Lead Counsel submitted the affidavit of its expert Robert Hoyer, a Participating Principal with Arthur Andersen LLP, and managing partner of the firm's Life & Health Actuarial Service group. Hoyer estimated the total value of the settlement at $1.987 billion, $1.187 billion attributable to the ADR process, and $799.6 million to Basic Claim Relief.[97] Hoyer Aff. ¶¶ 6, 11, 15. According to Hoyer's calculations, $863.7 million of the settlement's total value was created under the Task Force plan, while the remaining $1.123 billion was the result of the enhancements created by class counsel. *See Fee Opinion*, 962 F.Supp. at 575.

To assist with its fee determination, the district court appointed an independent fee examiner, Stephen Greenberg, on November 6, 1996.[98] Greenberg was charged

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[97] This figure assumes a 3% remediation rate, which is equivalent to the remediation of approximately 330,000 claims.

[98] Although Krell filed an emergency motion to vacate this order, the district court denied the motion on the grounds that Krell had waived his right to object. *See* Fee Opinion, 962 F.Supp. at 575 n. 9 (citing *In re Prudential Ins. Co. of America Sales Practice Litigation*, No. 95-cv-4704, slip op. (D.N.J. Feb. 11,

with analyzing the fairness of Lead Counsel's fee request. The fee examiner submitted his Report and Recommendation on February 13, 1997, concluding the $90 million fee award was fair and reasonable. Krell was the only objector to the Fee Examiner's Report. Fee Opinion, 962 F.Supp. at 576. On March 10, 1997, the district court held a hearing dedicated to attorneys' fees, and provided an opportunity for all interested parties to address the fairness of the Fee Petition.

B. *Fee Opinion*

On March 20, 1997 the court issued its opinion and order with respect to attorneys' fees. As urged by Lead Counsel in its fee petition, the district court found this case analogous to the common fund paradigm, and elected to apply the percentage-of-recovery method to calculate the attorneys' fee award.[99] Fee Opinion, 962 F.Supp. at 579. Despite accepting the percentage-of-recovery method, the district court rejected both the fee petition and the fee examiner's Recommendation and Report, and in its place constructed a bifurcated fee award

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1997)). Krell has renewed his objections to the fee examiner on appeal.

[99] The court reasoned that, although the class settlement and the attorneys' fee award were negotiated independently, Prudential was responsible for both and therefore they are drawn from the same "fund." In addition, the court found that the minimum payments required of Prudential constituted a common fund on which it could accurately calculate a portion of the fee award. Fee Opinion, 962 F.Supp. at 579.

designed to provide no less than $45 million and no more than $90 million to class counsel.[100]

The district court found that "any fee awarded to class counsel in this case should be based upon the entire value of the settlement, including any portion which would have been provided to the class under the Task Force Plan." Fee Opinion, 962 F.Supp. at 581 (emphasis omitted). The court reasoned the Task Force Plan "resulted in substantial measure from the efforts of class counsel in this litigation," noting that Prudential began to urge the formation of the Task Force only after the consolidated lawsuits were filed. Fee Opinion, 962 F.Supp. at 581-82. Considering both the causal connection as well as the additional enhancements created by the Proposed Settlement, the court concluded class counsel could reasonably be credited with all of the benefits provided under the settlement.

Turning to the value of the settlement, the district court found the only "specific, comprehensive valuation of the settlement that is of record" was submitted by class counsels' expert, Robert Hoyer.[101] Relying on Hoyer's

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[100] The district court also rejected separate fee petitions filed by attorneys for various objectors. Fee Opinion, 962 F.Supp. at 593-94 ("The Court finds that Objectors' Attorneys neither improved the settlement, assisted the court nor enhanced the recovery . . . [and] will deny the Objectors' Attorneys request for attorneys' fees.").

[101] Hoyer calculated the settlement's total value at $1.987 billion, assuming 330,000 remediated claims. He attributed $1.187 billion to the ADR program, and the remaining $799 million to Basic Claim Relief. Hoyer also calculated the value of the Task Force plan to be approximately $863 million, with $490

figures, the fee examiner's report calculated the value of the proposed settlement between $1.2 and $2 billion, depending on the number of class members who ultimately have claims remediated through the ADR process.

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attributable to the ADR program and $373 attributable to Basic Claim Relief. This represents a total enhancement of $1.123 billion. Hoyer also found the settlement would result in increased remediation, calculating that for every 110,000 claims remediated under the proposed settlement, only 83,300 claims would be remediated under the Task Force plan. *See* Hoyer Aff. ¶¶ 6, 11, 13, 15; Fee Opinion, 962 F.Supp. at 575.

Prudential submitted separate valuations from Patricia Guinn, of Tillinghast-Towers Perrin, and Daniel McCarthy, of Milliman & Robertson, Inc., calculating the value of the ADR and Basic Claim Relief. Guinn found that the "shared elements" of the ADR programs contained in the Task Force plan and the proposed settlement have a value of $221 million per 110,000 claims remedied. She also calculated that, with the enhancements, the number of claims remedied would rise to 118,480 and have a value of $261.2 million. McCarthy calculated that the value of the Basic Claim Relief under the proposed settlement would range from $272 million to $686 million, and that the best estimate of its value was $425 million. This was an improvement over the value of the Basic Claim Relief contained in the Task Force plan, which ranged from $208 million to $535 million, with a "best estimate" of $330 million. Fee Opinion, 962 F.Supp. at 582 n. 25.

Although the district court accepted Hoyer's calculations, it found the valuations submitted by Guinn and McCarthy were flawed. The court noted that Guinn's calculations did not provide an estimate of the number of claims that would ultimately be addressed. Similarly, the court questioned McCarthy's conservative estimate of the value of the Basic Claim Relief, which was far below previous calculations, noting that the "BCR valuations generally have gone uncontested in this litigation." *Id.*

Fee Examiner's Report at 56. But the district court "question[ed] the reasonableness of any valuation that may differ by as much as $800 million," and expressed concern that a range of possible values might not satisfy the requirement that a district court determine the actual value of the settlement when calculating the award of attorneys' fees. Fee Opinion, 962 F.Supp. at 583. Consequently, the court found "the nature of the Settlement Agreement simply [did] not lend itself to a reasonable valuation" and rejected the fee examiner's report. *Id.*

The court also found it imprudent to apply the lodestar method as its primary tool in calculating attorneys' fees.[102] First, the court noted there was no need in this instance to "ensure the procurement of competent counsel," one of the underlying purposes of the lodestar method. Additionally, the court found the involvement of over 25 law firms and 250 attorneys and paralegals would make a lodestar calculation time-consuming and burdensome.[103] Finally, the court reasoned that application of the lodestar method was unnecessary because a modified version of the percentage-of-recovery method could be applied. *Id.* at 27-28.

The district court decided to calculate the fee award in two parts; first, an award based on "a percentage of

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[102] The lodestar method calculates the attorneys' fees based on the number of hours reasonably expended by counsel.

[103] The court found that, as of January 31, 1997, the lodestar amount totaled $17.7 million, a figure which did not include "significant events" such as the fairness hearing, which occurred after that date. Fee Opinion, 962 F.Supp. at 584 & n. 29.

recovery on the known value of the settlement – Prudential's guaranteed minimum payout of $410 million (the "Minimum Fund")," Fee Opinion, 962 F.Supp. at 584; and second, an award based on a "separate percentage of recovery with respect to the future, additional value of benefits to be paid to class members who come forward under the Settlement Agreement (the "Future Fund")." *Id.*

Examining several factors in order to calculate an appropriate percentage under this two tier analysis, the court noted that, although percentages from 20 to 30% have been deemed appropriate, the exceptional size of the class recovery in this instance counseled in favor of a lower percentage of recovery. The district court examined the fee awards in other cases involving substantial recoveries, and found a range of 4.1% to 17.92% in cases where the recovery exceeded $100 million. The district court also considered the quality of class counsel's representation, the "innovative" terms of the settlement, the enhancements over the Task Force Plan, and the overall fairness of the settlement. *Id.* at 585-87. The court concluded the "results achieved by plaintiffs' counsel in this case in the face of significant legal, factual and logistical obstacles and formidable opposing counsel, are nothing short of remarkable." *Id.* at 585-86.

Finally, the court considered the fee percentage private parties would likely have negotiated. The fee examiner's report examined the fee awarded in the settlement between Penzoil and Texaco and concluded that class counsel would have received a contingent fee of at least 10-15%. Fee Examiner's Report at 61. While the court ultimately rejected the fee report, it nonetheless agreed that "given the obvious risks and burdens required for its

prosecution, lawyers of plaintiffs' counsels' standing would have negotiated a fee of at least 10 to 15% of the recovery."[104] Fee Opinion, 962 F.Supp. at 587 (quoting Fee Examiner's Report at 61).

Turning to the first part of its bifurcated fee award, the district court found that 11% was a fair and reasonable recovery with respect to the $410 million Minimum Fund. Accordingly, the court ordered Prudential to pay class counsel $45 million, plus expenses, within five days. The court then conditioned the second half of the fee award on the number of claims ultimately handled through the ADR process. In the event 330,000 claims were filed by June 1, 1997, Prudential would pay class counsel an additional $45 million. Assuming the full $90 million were awarded, the fee would equal approximately 6.7% of the minimum recovery guaranteed by Prudential under the settlement.[105] The court found this

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[104] While the district court does not offer any explanation of the "risks and burdens" facing class counsel, we assume this is a reference to the risks of establishing liability and damages at trial discussed in the court's fairness opinion. *But see* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L.Rev. 497, 578 (Feb.1991) (arguing that a multiplier designed to address the contingency factor is unnecessary because "there appears to be no appreciable risk of nonrecovery, for virtually all cases are settled").

[105] Under the settlement, Prudential guaranteed to pay a minimum of $260 million per 110,000 claims processed. Assuming 330,000 claims, this would result in a minimum payment of $780 million. In addition, Prudential promised to pay an additional remediation amount of $300 million in the event more than 330,000 claims were remediated. Combining these figures with the minimum valuation of the Basic Claim

figure to be fair and reasonable. In the event the 330,000 threshold were not met, class counsel would not be entitled to an automatic fee award, but would receive a 5% contingent fee based on the value of the Future Fund – "the total value of the settlement less the Minimum Fund" – to be determined annually on the anniversary date of the Fee Opinion.[106] Fee Opinion, 962 F.Supp. at 588-89.

The court then applied the lodestar method as a cross-check of its initial calculation. According to an analysis provided by Lead Counsel, the lodestar as of January 31, 1997 was $17.7 million, plus expenses of just over $3 million. *Id.* at 591. Using these figures, the court found the maximum fee award of $90 million would be equivalent to a multiplier of 5.1 and an average hourly rate of $1,148.70. The court found that, when the lodestar was updated, the resulting multiplier and hourly rate would be lower. Nonetheless, the district court found these higher, unadjusted figures were substantially less than the multiplier and average hourly rate applied by the district court and affirmed by this court in *Weiss v. Mercedes-Benz of N. Am., Inc.*, 66 F.3d 314 (3d Cir.1995), *aff'g* 899 F.Supp. 1297, 1304 (D.N.J.). Consequently, the district

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Relief – $272 million – the court calculated that Prudential would be obligated to pay $1.352 billion. *See* Fee Opinion, 962 F.Supp. at 589 n. 38.

[106] This figure was capped so that the total fee award, including the initial $45 million, would not exceed $90 million. Fee Opinion, 962 F.Supp. at 589.

court concluded the cross-check under the lodestar supported the fairness and reasonableness of the fee award. Fee Opinion, 962 F.Supp. at 592-93.[107]

The district court summarized its reasons why this fee arrangement was both appropriate and beneficial. *Id.* at 589-91. First, the court found the award "obviate[d] the need to guesstimate the value of the settlement and ensures an award of attorneys' fees that is rationally related to the success of the settlement." *Id.* at 589. Second, the fee award used the percentage-of-recovery method preferred in common fund cases and avoided the difficulties in applying the lodestar method. Third, the court found the bifurcated award worked as a safeguard in the event the settlement was "unsuccessful" by only providing a portion of the award up front, and making the second part of the award dependent on the actual remediation rate. Fourth, the court noted the fee award generally upheld the agreement of the parties. Fifth, the court reasoned the bifurcated award would provide class counsel an incentive to pursue diligently remediation for class members. Finally, the court found the fee arrangement "answer[ed] the few class members, including Krell,

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[107] Krell objected to the district court's application of the lodestar method, arguing the court improperly based its calculations on time summaries provided by class counsel rather than detailed time reports. The court rejected this argument, reasoning that the time summaries were sufficient in this case because the court was only using the lodestar analysis as a cross-check on the fee award. Fee Opinion, 962 F.Supp. at 591 n. 47. In addition, the court noted that the lodestar figures used were actually understated because they did not include time spent by class counsel subsequent to January 31, 1997. *Id.*

who objected to the parties' fee agreement as a 'lay down' by Prudential." *Id.* at 591.

C. *Analysis*

"[A] thorough judicial review of fee applications is required in all class action settlements." *G.M. Trucks,* 55 F.3d at 819. When parties are negotiating settlements, the court must always be mindful of the "danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees." *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 524 (1st Cir.1991). On appeal, we review the district court's award of attorney's fees for an abuse of discretion. *G.M. Trucks,* 55 F.3d at 782.

There are two basic methods for calculating attorneys' fees – the percentage-of-recovery method and the lodestar method. "[E]ach method has distinct advantages for certain kinds of actions, which will make one of the methods more appropriate as a primary basis for determining the fee." *G.M. Trucks,* 55 F.3d at 820. The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund "in a manner that rewards counsel for success and penalizes it for failure." *Id.* at 821. The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method

would provide inadequate compensation. *Id.*[108] It may also be applied in cases where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method. *Id.* Although each of these methods is generally applied to certain types of cases, we have noted previously that "it is sensible for a court to use a second method of fee approval to cross check" its initial fee calculation. *Id.* at 820.

We agree with the district court that this case is more appropriately viewed under the common fund paradigm than as a statutory fee-shifting case.[109] Consequently, the

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[108] Some critics have argued that the lodestar method gives attorneys an incentive to increase their billable hours by delaying settlement as long as possible. *See, e.g., Court Awarded Attorney Fees,* Report of the Third Circuit Task Force, 108 F.R.D. 237, 247-48 (Oct. 8, 1995) (citing *In re Fine Paper Antitrust Litigation,* 751 F.2d 562 (3d Cir.1984)). Others contend the lodestar method creates a rift between the class and its counsel, and may lead to collusive settlements in which plaintiffs' attorneys are willing to accept a low settlement in exchange for lucrative fees. *See, e.g.,* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 Colum. L.Rev. 669, 716-17 (May 1986).

[109] While the use of contingent fees has generally been favored, courts have encountered several difficulties in determining the correct fee. Fee cutting in aggregate mass torts can usually be justified because the aggregation of claims lessens the force of the traditional justifications for contingency fees – enabling access, providing legal services and rewarding risk. *See* Curtis & Resnik, *Contingency Fees In Mass Torts,* 47 DePaul L.Rev. at 448. Yet aggregation does not entirely eliminate the risks involved in mass torts, and thus these cases often require difficult factual analysis to determine an

district court was required to make a "reasonable estimate" of the settlement's value in order to calculate attorneys' fees using the percentage-of-recovery method. *Id.* at 822 (holding that "the district court on remand needs to make some reasonable assessment of the settlement's value"); *Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F.Supp. at 1304. But, as the district court noted, this is "an atypical common fund case" involving an uncapped, "future fund" whose ultimate value is dependent on the final number of claims remediated under the settlement, and, as a result, "the settlement . . . cannot reasonably be valuated." Fee Opinion, 962 F.Supp. at 583. The fee examiner's report reflected this uncertainty. The report could only offer a range of possible values, with the highest and lowest figures separated by over $800 million. Even class counsel's own expert conceded that his calculations were merely "approximations." Hoyer Aff. ¶ 18. Consequently, a straightforward application of the percentage-of-recovery test is difficult in this instance.

The district court attempted to overcome this problem by bifurcating the fee award, exercising its sound discretion to award reasonable attorneys' fees. *Silberman v. Bogle*, 683 F.2d 62, 64-65 (3d Cir.1982). The district court's plan was designed to overcome the speculative nature of the tentative and imprecise settlement valuations. It took into account the settlement's more definite

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appropriate fee. We note that there may be better ways to assess the work done by attorneys in these kinds of cases. Administrative regulations or the fees awarded in probate court may provide a closer analogy than the individual contingent award common in individual cases. *Id.* at 454.

terms by providing an immediate payment based on a percentage of the guaranteed minimum recovery of $410 million, while requiring future payments to be based on actual results in recognition that the ultimate class recovery is not quantifiable at this point. We hold the district court's creation of a bifurcated fee structure was an appropriate and innovative response to the structure of the settlement, and well within its sound discretion.[110]

Our review does not end here, however. We must still examine the fee award calculated by the district court under this bifurcated structure and determine whether the amount of the award was fair and reasonable. Before doing that, however, we will first address two objections raised by Krell which focus on procedural aspects of the fee award. First, Krell claims the settling parties improperly discussed attorneys' fees and entered into a "clear-sailing fee" agreement, thereby creating a conflict between class counsel and the class. Second, Krell maintains the attorneys' fee award adversely affects class

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[110] We note, however, that we have some doubt as to the ultimate effectiveness of the incentives created by the fee award. The court hoped that, by linking the fee award to a threshold number of responses, class counsel will have an incentive to remain involved. But here that threshold figure was easily met, and thus the incentive for class counsel's continued involvement has been removed. While we believe that incorporating such an incentive is appropriate, it would be arguably more effective to link the second half of the fee award to a threshold which is more indicative of the settlement's success. For example, basing the second portion of the fee on the number of claims actually remediated would better serve the district court's goal of encouraging class counsel's continued participation.

members by reducing the value of the members' equity interest in Prudential. The net result, he argues, is that class members are forced to shoulder the burden of the fee award, despite class counsel's and Prudential's assertions to the contrary.[111]

1. "Clear-Sailing" Fee Agreement

Krell maintains the settling parties improperly entered into negotiations on counsel fees before concluding settlement negotiations. Krell hypothesizes that because Prudential wanted as broad a release as possible in order to avoid all future liability, they offered class counsel large fees.

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[111] Krell also renews his objection that the fee examiner in this case did an inadequate job of reviewing Lead Counsel's fee request. Krell claims that the fee examiner was a Rule 53 special master, as stated in the February 11, 1997 order, and thus was required to keep a record. Instead, Krell claims the fee examiner based his conclusions on *ex parte* submissions and kept no record of the evidence or testimony he considered. The district court rejected these arguments in its Fee Opinion, concluding that Krell misunderstood the fee examiner's role. First, the court noted that the November 6, 1996 order does not refer to Rule 53, and points out that, at the fee hearing on March 10, 1996, the court specifically stated that the fee examiner had been appointed as a technical expert under Rule 54(d)(2)(D). Second, the court said it had already addressed Krell's "hypertechnical" arguments for disqualification of the fee examiner in its opinion denying Krell's emergency motion to vacate the November 6th order. Finally, the court noted it had determined not to adopt the Fee Examiner's Report. Fee Opinion, 962 F.Supp. at 576 n. 11. We see no abuse of discretion here.

In both its Fairness Opinion and its Fee Opinion, the district court addressed Krell's contention the parties simultaneously negotiated the settlement and fee agreements. The district court found "the parties obviated the danger of an actual or apparent conflict of interest on the part of class counsel by negotiating in a manner expressly recommended by the Third Circuit in *Prandini* and by a Task Force appointed by the Third Circuit to report on the subject of court awarded attorneys' fees." Fee Opinion, 962 F.Supp. at 577 (citing *Court Awarded Attorney Fees,* Report of the Third Circuit Task Force, 108 F.R.D. 237 (Oct. 8, 1995)).[112] Relying on the settling parties' sworn affidavits,[113] the district court found all parties acted

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[112] In *Prandini v. National Tea Co.,* 557 F.2d 1015 (3d Cir.1977), we rejected a settlement agreement which contained an award of attorneys' fees, holding class counsel should not simultaneously negotiate both a settlement and attorneys' fees. The Task Force, concerned about the chilling effect *Prandini* might have on settlement, suggested "the defendant should be permitted to make an offer of settlement that is conditional on a subsequent satisfactory resolution of the question of fees," or the parties could seek the court's permission to discuss fees. *Court Awarded Attorney Fees,* 108 F.R.D. at 269. The Supreme Court has also held that parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees." *Evans v. Jeff D.,* 475 U.S. 717, 738 n. 30, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986).

[113] The district court found it could properly rely on the settling parties' affidavits, noting the Third Circuit Task Force report specifically authorizes a district court to "ascertain whether improper talks have taken place by requesting the information in a signed statement that would be subject to the sanction provisions of Federal Rules 7 and 11." Fee Opinion, 962 F.Supp. at 577 n. 14 (quoting *Court Awarded Attorney Fees,* 108 F.R.D. at 267).

appropriately, having first completed negotiation of the Settlement Agreement on September 22, 1996 and then obtained the court's authorization on October 11, 1996 to address fees. *Id.* at 577 n. 14; *see also* Fairness Opinion, 962 F.Supp. at 542 ("The parties' negotiation of attorneys' fees was completely appropriate and followed the final settlement negotiations."). The court also found Krell had failed to produce "sound evidence" to support its contentions.

We agree with the district court. There is no indication the parties began to negotiate attorneys' fees until after they had finished negotiating the settlement agreement. On review we grant deference to the district court's factual findings. Despite Krell's repeated references to the "September 22, 1996 clear sailing fee provision," the Settlement Agreement signed on that date did not contain a "clear sailing" provision. Unlike Section K of the final Stipulation of Settlement filed on October 28, 1996, the September 22, 1996 Settlement Agreement did not address the amount of fees, the timetable for the payment of fees, or Prudential's agreement not to object to any fee petition filed by plaintiffs' counsel. As Lead Counsel notes, the September 22 Settlement Agreement contained a termination provision which allowed Prudential, but not plaintiffs, to terminate the agreement if the issue of attorneys' fees was not resolved to its satisfaction.[114] Lead Counsel Brief at 83-84.

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[114] Section N.3 of the Settlement Agreement provides:

> Notwithstanding the preceding subsection N.2., Plaintiffs may not terminate the Settlement Agreement solely because of the amount of Attorneys' Fees awarded by the [District] Court or

2. Adverse Effect on Class Members

Krell also claims the district court failed to consider the negative financial impact the settlement would have on class members. According to this argument, class members, who as policyholders have an "equity interest" in Prudential's surplus, are harmed because the settlement will decrease that surplus. Krell Brief at 67-68.

The district rejected this argument, finding the payment of attorneys' fees would not have a negative financial impact on class members. The court reasoned that "any such payment of fees may come from the proceeds of director and officer liability insurance or from Prudential's capital surplus . . . [and] will not necessarily affect policyholders' future dividends and interest payments on their policies." Fee Opinion, 962 F.Supp. at 589 n. 40.

Krell points to no record evidence to demonstrate the settlement would have a detrimental effect on the dividends of Prudential policyholders. Krell cites only to Exhibit G of his fee discovery motion, dated December 11, 1996, which contains the affidavit of Professor David F. Babbel of The Wharton School of the University of Pennsylvania, originally filed in connection with the Phoenix Home Life Mutual Insurance Company litigation in New York state court. Although Professor Babbel's affidavit explains that compensation paid by a mutual

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any appellate court(s). Prudential, however, may elect to terminate the Settlement Agreement on or before October 25, 1996, if the Settling parties cannot agree on the amount of Attorneys' Fees that Plaintiffs will apply for and Prudential will not oppose.

insurer to a hypothetical class comprised of the insurer's policyholders may result in "a reduction in dividends paid to the policyholders, or a reduction in the surplus that backs the claims of the policy owners against the firm," Babbel Aff. ¶ 9, he concludes the proposed settlement[115] "[took] advantage of the financial strength and economies of scale available to" the mutual insurer and overcame the concerns for the policy owners' equity interest. Babbel Aff. ¶ 11. We see no error here.

3. Fairness of the Award

Krell's remaining objections focus on whether the district court properly calculated the fee award. In particular, he challenges the court's decision to credit class counsel for all of the benefits created by the Task Force plan, as well as its determination of the appropriate fee percentage. Krell also contends the district court improperly denied his requests for discovery, and as a result did not have sufficient information to assess the fairness of the award. Because the discovery issues are intertwined with the court's final calculation of class counsel's fee, we will address these objections together.

a. The Value of the Settlement

As noted, the district court found the settlement was most closely aligned to the common fund paradigm and

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[115] The settlement in that case contained relief similar to the ADR process and Basic Claim Relief available here.

that a percentage-of-recovery calculation was the appropriate measure of the attorneys' fee award. In addition, the court created a bifurcated award designed to compensate class counsel based on the "guaranteed minimum" benefit created under the settlement, while at the same time tying the second part of the award to the class's response rate, in order to create an incentive for class counsel's continued participation in the remediation process. While we agree with both the method of calculation selected by the court and the structure of the fee award it crafted, we are nonetheless troubled by the actual calculation of class counsel's fee.

In particular, we question the court's decision to base its fee calculation on "the entire value of the settlement, including any portion which would have been provided to the class under the Task Force Plan." Fee Opinion, 962 F.Supp. at 581 (emphasis omitted). This decision was based on the court's conclusion that class counsel was a "material factor in bringing about the regulators' Task Force plan." *Id.* at 582. The court offered two reasons for this conclusion. First, the court found "Prudential's counsel acknowledged the causal relationship between the lawsuits and the Task Force's formation and subsequent remediation plan." *Id.* (citing Fee Examiner's Report at 56). Second, the district court explained "the record shows that plaintiffs' counsel otherwise substantially contributed to the terms of the Task Force plan." *Id.*

The district court relied in part on our decision in *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758

F.2d 897 (3d Cir.1985).[116] In that case, a class action civil rights lawsuit was filed on behalf of all juveniles in Pennsylvania who had been voluntarily committed to state mental health institutions. The class challenged the constitutionality of Pennsylvania's "voluntary" commitment statute on due process and equal protection grounds. Pennsylvania eventually enacted legislation and accompanying regulations which provided much of the relief sought by the class, and the district court entered judgment for defendants and terminated the class. Plaintiffs petitioned for attorneys' fees under 42 U.S.C. § 1988. We affirmed the causation finding, noting "the district court specifically found that defendants had been 'extensively involved in the legislative process' and that defendants 'actively worked with the legislature to achieve passage of the 1976 Act.' " 758 F.2d at 917. The district

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[116] Krell argues that this reliance is misplaced. Krell contends that *Institutionalized Juveniles* only addresses the question of counsel's entitlement to attorneys' fees in the context of a statutory fee-shifting case, but not the distinct question of how much of a common fund may be attributed to the efforts of counsel. We disagree. The question of entitlement to a statutory fee shifting award and the entitlement to a portion of a common fund are analogous, and the same concerns undergird the determination in both cases. As we noted in *Institutionalized Juveniles*, the relevant inquiry to determine eligibility for fees (whether plaintiffs prevailed and whether the litigation was causally linked to the relief obtained) "focuses a court's attention on the benefits actually received and caused by plaintiffs, [and] will determine not only the often evident threshold question of eligibility for fees, but it will also be critical in determining the amount of a reasonable fee award, in that the final award must depend on a full assessment of the extent of the benefits received by plaintiffs." 758 F.2d at 910.

court here placed great emphasis on our holding that "although the litigation must have been a 'catalyst' . . . it need not have been the only catalyst." *Id.* at 916. As a result, the district court concluded it "should consider not only those remedies conferred directly through the litigation process, but also those extra-judicial benefits to the plaintiffs which resulted from counsels' efforts in the litigation." Fee Opinion, 962 F.Supp. at 581 (citations omitted).

As a preliminary matter, we believe the facts of that case are distinguishable. In *Institutionalized Juveniles,* we noted the record contained an affidavit from the chairman of the Pennsylvania Senate Health and Welfare Committee responsible for drafting the litigation in question, in which he confirmed that the litigation, and plaintiffs' counsel in particular, were an " 'important catalyst' in bringing about the changes in Pennsylvania law." 758 F.2d at 917. In addition, it is easy to overstate the principle set forth in *Institutionalized Juveniles.* While a party need not be the only catalyst in order to be considered a "material factor" and may be credited for extra-judicial benefits created, there must still be a sound basis that the party was more than an initial impetus behind the creation of the benefit. Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs attorneys to "minimize the costs of failure . . . by free riding on the monitoring efforts of others." Coffee, *Understanding the Plaintiff's Attorney,* 86 Colum. L.Rev. at 681 (noting that the "classic illustration of this pattern is in the field of antitrust enforcement,

where private antitrust class actions have tended to piggyback on a prior governmental proceeding").

It is not clear on the record before us that class counsel had so significant a role in the institution of the Task Force proceedings that the district court was justified in crediting counsel for all of the benefits created under the Task Force plan. Indeed the district court offers no record citation or other explanation to supports [sic] its assertion that class counsel made "substantial contributions" to the terms of the Task Force plan.

After reviewing the record, we have doubts whether class counsel was a material factor in bringing about the Task Force plan. Although Prudential may have urged the formation of the Task Force following the institution of the lawsuits, there is evidence to suggest that, absent the institution of the class action proceedings, state regulators would have reached an agreement with Prudential similar to the Task Force plan. For example, Lead Counsel notes that "[a]t least every five years, the New Jersey Department of Banking and Insurance is required to conduct a market conduct examination of Prudential . . . [and in] March 1995, New Jersey was beginning another such examination." Weiss Aff. ¶ 27. The results of that examination were issued on July 28, 1996, only a few weeks after the Task Force Report, and examined a number of the same issues as the Task Force Report, including customer complaints of vanishing premiums, misrepresentation, improper replacements, and other improper underwriting other than replacements. Furthermore, the Task Force itself explained that it was formed "in response to widespread allegations of improper sales and marketing activity of life insurers" in general, not just

allegations involving Prudential. Taken together, the record evidence raises questions about whether the district court could appropriately base class counsel's fee on the entire value of the proposed settlement.

Assuming *arguendo* that class counsel was a "catalyst" for the Task Force plan, the question remains to what degree that factor must be considered when calculating the fee award. "[N]umerous courts have concluded that the amount of the benefit conferred logically is the appropriate benchmark against which a reasonable common fund fee charge should be assessed." Conte, 1 *Attorney Fee Awards* § 2.05, at 37. The district court found class counsel should be credited for the entire value created by the Task Force plan, instead of only those enhancements created by class counsel under the Settlement Agreement. We are not so certain. Krell notes that a stay order was in place from October 1995 until after the Task Force issued its report on July 9, 1996, and questions how the district court could credit class counsel for the entire value of the Task Force Plan. In addition, we question why class counsel should be credited for the global enhancements negotiated between Prudential and each of the four objecting states, enhancements which the district court found were incorporated into the final settlement.

We do not dispute that class counsel's efforts benefitted the class and that they should receive a fee award which recognizes those efforts. The district court described several enhancements class counsel made to the Task Force plan. *See supra* § I.B.1. & notes 21-22. Even Krell conceded that class counsel created additional benefits for the class. Fee Hr'g Tr. at 17-18. Our concern is not the number of enhancements created, but rather how to

value the benefits created by class counsel. The crux of this inquiry is distinguishing those benefits created by class counsel from the benefits created under the Task Force Plan. This determination is especially crucial in consumer class actions where federal or state agencies, including attorneys general, have conducted their own investigations of wrongdoing. The district court did not address these issues. Because it credited class counsel with creating the entire value of the settlement it did not attempt to distinguish between those benefits created by the Task Force and those created by class counsel. Consequently, we will remand to the district court for further examination.

In addition, the matters raised here may counsel in favor of allowing additional limited discovery on this issue on remand. While plaintiffs' expert found that class counsel was responsible for $1.123 billion of the settlement's total value, he also conceded that those figures were merely "approximations." Krell claims the lack of discovery prevented him from performing a similar analysis and rebutting the expert's valuations. Although mindful of the common wisdom that "discovery in connection with fee motions should rarely be permitted," *Manual for Complex Litigation, Third* § 24.224, we believe limited discovery may be necessary in this instance to properly determine the value of those benefits for which class counsel can properly be credited. We leave this to the sound discretion of the district court.

b. The Appropriate Percentage Recovery

We are also troubled by the district court's calculation of the appropriate percentage award. The district court actually examined two distinct percentages in connection with its bifurcated fee award. First, it awarded class counsel approximately 11% of the "Minimum Fund" of $410 million created by the settlement, resulting in an initial award of $45 million. Second, based on the submission of at least 330,000 election forms, the court awarded class counsel an additional $45 million. Assuming the threshold were met and the full $90 million fee were awarded, the court found this fee constituted 6.7% of the "common fund" created under the settlement,[117] a figure the district court concluded was "fair and reasonable . . . [and] comport[ed] with the Fee examiner's recommendation of an award of 7-8%." Fee Opinion, 962 F.Supp. at 587-88.

The district court considered several factors in order to determine the appropriate percentage award, including the size of the award, fee percentages applied in other class actions, the quality of class counsel, and the fee percentage that would likely have been negotiated between private parties. While we agree these factors offer some guidance, in cases of this magnitude they should receive less weight.

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[117] The court calculated this figure by taking the minimum ADR payment required in the event 330,000 claims were remediated – $1.08 billion – and adding the lowest estimated value for Basic Claim Relief – $272 million. The resulting "common fund" would be $1.352 billion.

In considering the size of the expected recovery under the proposed settlement, the district court observed that "percentage awards generally decrease as the amount of the recovery increases." Fee Opinion, 962 F.Supp. at 580 (citations omitted). The basis for this inverse relationship is the belief that "[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *In re First Fidelity Bancorporation Securities Litigation*, 750 F.Supp. 160, 164 n. 1 (D.N.J.1990). The district court concluded that "some reduction is appropriate in this case where the recovery will equal at least $410 million." Fee Opinion, 962 F.Supp. at 585.

We agree with the district court's analysis, but question whether the "reduction" implemented adequately adjusted the fee in relation to the size of this settlement. Compared to the other large settlements examined by the district court, the size of this settlement exceeds all of them by a considerable margin.[118] Yet the 6.7% fee the

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[118] Among the settlements considered by the district court were *In re Baldwin-United Corp. Litig.*, 1986 WL 12195 (S.D.N.Y.), where attorneys' fees constituted 4.1% of the $183.8 million settlement fund; *In re Agent Orange Prod. Liab. Litig.*, 611 F.Supp. 1296 (E.D.N.Y.1985), where the fee award constituted 5.5% fee of the $180 million settlement fund; and *In re MGM Grand Hotel Fire Litig.*, 660 F.Supp. 522 (D.Nev.1987), where the fee award constituted 7% fee of the $205 million settlement fund. This comparison does not include the $3 billion recovery in the *Penzoil* litigation, for which plaintiffs' counsel received an estimated fee of 14% based on a privately negotiated fee agreement. *See* Fee Opinion, 962 F.Supp. at 587 n. 35 (citations omitted).

court awarded was actually higher than some of the smaller cases it used as a benchmark.

The district court also examined the fee awards in class actions with recoveries exceeding $100 million and found the fee percentages ranged from 4.1% to 17.92%. *Id.* at 585. The court reasoned the "enormous settlements" in those cases made them comparable, and provided some guidance as to an appropriate percentage. *Id.* at 586 n. 32. While we agree this is an appropriate factor to consider in most class actions, we believe in this instance the size of the class and the settlement render such comparisons unreliable. As noted, the fee percentage awarded by the court was actually higher than some of the fee awards in these large class actions, despite the court's finding that the common fund here would be at least $410 million and could increase to more than $1 billion.

The district court also found class counsel's representation and the results achieved were "nothing short of remarkable." *Id.* at 585-86. Among the factors it examined were the "innovative" terms of the settlement, including the availability of full compensatory relief, the extensive and comprehensive outreach, and the multi-tiered review process designed to ensure fair scoring of claims; the approval given to the settlement by insurance regulators from all fifty states and the District of Columbia; and the standing and skill of class counsel.

We agree. As discussed, the settlement is a fair and reasonable resolution of this class action. Furthermore,

there is no doubt as to class counsel's skill and reputation. All agree class counsel added value to the Task Force plan.[119]

The district court then noted the fee examiner's conclusion that "were this case the subject of a private contingent fee agreement at the time of engagement, counsel might well have demanded and received . . . upward of 20%, and even as high as 40%, of any future recovery." *Id.* at 587 (quoting Fee Examiner's Report at 60). While the court did not give great weight to this hypothetical exercise, it nonetheless agreed with the fee examiner's conclusion that class counsel "would have negotiated a fee of at least 10 to 15% of the recovery." *Id.* (quoting Fee Examiner's Report at 61).

We question the significance of this inquiry to class action lawsuits of this magnitude. While such private fee arrangements might be appropriate in smaller class actions or litigation involving individual plaintiffs, we do not believe they provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding $1 billion.

Because the district court's basis for, and calculation of, the appropriate fee percentage was unclear in light of the facts and cases it referenced, and because it should set forth a reasoned basis and conclusion regarding the proper percentage applicable in this case, we will remand

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[119] The district court noted that Krell's counsel conceded that "there is no question that lead counsel is entitled to a fee. They have created benefits." Fee Opinion, 962 F.Supp. at 578 n. 15 (quoting Fee Hr'g Tr. at 17-18).

for a more thorough examination and explication of the proper percentage to be awarded to class counsel in this case, in light of the magnitude of the recovery.

c. Lodestar Calculation

Krell objects to the district court's application of the lodestar method to cross-check its fee award, in particular its application of a "risk" multiplier to the lodestar in order to bring the calculation in line with the fee awarded under the percentage-of-recovery method. In addition, Krell contends the court improperly based its lodestar calculation on inaccurate time summaries provided by class counsel.

i. Multiplier

Once the district court created its bifurcated fee award using the percentage-of recovery model, it employed the lodestar method to cross-check the fee award. *See G.M. Trucks*, 55 F.3d at 820. Based on the analysis submitted by Lead Counsel, the court found the lodestar as of January 31, 1997 was approximately $17.7 million[120] plus expenses of just over $3 million. While it noted this figure was understated because it did not include hours billed after Lead Counsel submitted the analysis, the court found the lodestar figure would result in a multiplier of only 5.1 and an average hourly rate of

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[120] This figure is based on the 75,607 hours claimed by class counsel, and excludes the district court's estimate of the hours spent in connection with the court-ordered investigation of alleged document destruction.

$1,148.70 if the full $90 million were awarded under the modified fee schedule. The court found this multiplier was "substantially less" than the multiplier approved by this Court in *Weiss v. Mercedes-Benz of North America, Inc.*, 66 F.3d 314 (3d Cir.1995), *aff'g* 899 F.Supp. 1297, 1304 (D.N.J.) (awarding a fee that resulted in a multiplier of 9.3 and an average hourly rate of $2,779.63).

We question the use of such a large a [sic] multiplier in this instance. Courts apply multipliers to lodestar calculations for various reasons. Multipliers may reflect the risks of nonrecovery facing counsel, may serve as an incentive for counsel to undertake socially beneficial litigation, or may reward counsel for an extraordinary result. By nature they are discretionary and not susceptible to objective calculation. The Third Circuit Task Force on Court Awarded Attorney Fees implicitly recognized this difficulty. *Court Awarded Attorney Fees*, 108 F.R.D. at 247 (the lodestar calculation "is subject to manipulation by judges who . . . first determine what they wish to award, either in percentage or dollar amount terms, and then massage the major variables in the [lodestar] fee-setting procedure"). Consequently, courts must take care to explain how the application of a multiplier is justified by the facts of a particular case. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) ("It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award."); *Ranco Industrial Products Corp. v. Dunlap*, 776 F.2d 1135, 1140 (3d Cir.1985) ("[C]areful appellate review requires that the district court explain on the record the basis for its calculation.").

In this instance, the court offers little explanation as to why a multiplier was necessary or appropriate. With no explanation for its application, we have no basis to evaluate it.[121] While we are cognizant that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied," 3 *Newberg* § 14.03 at 14-5, we cannot assess the propriety of a multiplier without findings to review.[122]

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[121] Interestingly, the district court noted in its opinion there was some question as to the application of multipliers following the Supreme Court's decision in *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), and claimed to avoid the issue by not considering risk enhancement factors in its determination of the appropriate percentage. Fee Opinion, 962 F.Supp. at 581 n. 24.

As the district court discussed, the Supreme Court held risk enhancements are inappropriate in the statutory fee-shifting context. *See Dague*, 505 U.S. at 565-67, 112 S.Ct. 2638. Although the Supreme Court has not addressed whether this prohibition also applies in common fund cases, the district court found "the Court's reasoning for excluding risk enhancements in fee-shifting cases applies equally to common fund cases." In addition, the court also took notice that jurisdictions are split as to the application of risk enhancements in the common fund context. Fee Opinion, 962 F.Supp. at 581 n. 24 (citing Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 49, 70-71 (Fed. Judicial Ctr.1994); 3 *Newberg* § 14.03 (Supp. July 1996)). Assuming that multipliers for risk or counsel's expertise are appropriate in the lodestar cross-check in common fund cases, they require particular scrutiny and justification.

[122] The Federal Judicial Center has also noted that the application of the lodestar method in common fund cases requires "virtually the same analysis as it does in fee-shifting cases." A. Hirsch & D. Sheehey, *Awarding Attorneys' Fees*, at 67. In addition, the Judicial Center notes that "[s]ome of the factors

Furthermore, the testimony of one of plaintiffs' own experts appears to call into question the multiplier of 5.1. Plaintiffs' expert noted the speed and quality of the results achieved were attributable "in no small part to the fact that many of class counsel had participated in the New York Life insurance litigation . . . in which they created what became the blueprint for the Task Force plan which, in turn, became the baseline from which class counsel began their negotiations with Prudential." Joint Appendix at 4793. While plaintiffs' expert reasoned this expertise should not lead to the conclusion that class counsel "should not be rewarded for what arguably appears to be duplicative," we also decline to draw the opposite conclusion.

We recognize the district court employed the lodestar calculation only as a cross check. Yet we cannot agree with its conclusion that the "cross-check under the lodestar method confirms that the fees and expenses awarded here are fair and reasonable under the circumstances of this case." Fee Opinion, 962 F.Supp. at 592-93. Based on the present record, we cannot find a justification for the multiplier, which appears merely to correspond with the total fee award. Our concerns regarding the lodestar calculation only underscore our questions about the propriety of the district court's fee award.

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justifying an adjustment of the lodestar in feeshifting cases will also apply in a common fund situation" regardless of which method is used to calculate fees. *Id.* at 69.

ii. Time Records

Krell also disputes the district court's calculation of the lodestar figure, claiming its reliance on time summaries, rather than detailed time records, undermines its value as a cross-check of the fee award. Krell raises certain issues which allegedly demonstrate the unreliability of class counsel's time summaries. First, he questions the number of hours worked by class counsel, noting the figure seems high in light of the district court's order staying discovery from October 1995 until August 1996.[123] Second, Krell alleges Lead Counsel's fee petition contained "millions of dollars of overcharges and potential overcharges."[124] Third, Krell notes the lodestar amount nearly doubled between the November and the February petitions, with Lead Counsel claiming additional time had been spent on due diligence, despite the fact that due diligence was expected to end on October

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[123] Although the district court based its Fee Opinion on Lead Counsel's analysis of the lodestar as of January 31, 1997, Krell relies primarily on Lead Counsel's fee petition dated November 22, 1996. Krell Brief at 63. Krell raises many of the same issues with regard to the revised fee petition, filed by Lead Counsel on February 7, 1997. *Id.* at 64-65.

[124] Krell claims that at least one law firm which petitioned for fees was fictitious. According to Krell, the son of a senior partner at Co-Lead Counsel Much, Shelist, Freed, Deneberg, Ament, Bell & Rubenstein, filed a fee petition for a non-existent firm requesting over $2 million. The district court deemed these mistakes unintentional and irrelevant. Fee Opinion, 962 F.Supp. at 592 n. 47.

28, 1996. Finally, Krell points out that the fee examiners' report included a $1 million overcharge for expenses.[125]

The district court disagreed, finding detailed time summaries were unnecessary where, as here, it was merely using the lodestar calculation to double check its fee award. The court also dismissed Krell's objection to the hours allegedly worked after the settlement was filed on October, 1996, reasoning that class counsel had other responsibilities after that date, including monitoring the 800 number established under the settlement, negotiating the outreach program, and preparing documents in support of the settlement.

As we have noted, district courts generally decide fee awards without full blown discovery. In any event, whether to grant discovery is committed to the sound discretion of the court. Also, we are mindful of the Supreme Court's admonition that "[a] request for attorneys' fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933. We recognize the lodestar calculation in this case was solely intended as a cross-check of the court's primary fee calculation using the percentage-of-recovery methodology, which counsels a cautious approach to additional fee discovery. Furthermore, our primary concern with the lodestar approach here is the multiplier. As a result, we see no abuse of discretion in declining to grant discovery here on the time records. As we have set forth, the district court on

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[125] The district court denied Krell's motion for fee discovery by order dated February 18, 1997.

remand should reconsider permitting limited discovery on the benefits to the class secured by class counsel.

D. *Conclusion*

In awarding attorneys' fees, the district court has considerable discretion. We recognize that in cases of this magnitude, the broad standards set forth in the case law provide little guidance. What is important is that the district court evaluate what class counsel actually did and how it benefitted the class. Furthermore, where so much of the settlement was achieved by the Task Force, and other enhancements resulted from the separate negotiations of state regulators, it is essential to separate out the benefits attributable to class counsel.

VII. KRELL'S MOTION TO RECUSE

A. *Procedural History*

On December 3, 1996, the Krell and Kittle plaintiffs moved on an emergency basis to recuse the district judge from this case under 28 U.S.C. § 455,[126] alleging *inter alia* improper *ex parte* meetings and judicial interference with related state court proceedings. The court issued a show

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[126] The Krell and Kittle plaintiffs were joined in their motion by Bruce Miller, on behalf of former Prudential agent Ricky Martin and as lead counsel in the Agent Action, and Anderson B. Doguli, representing seven individual policyholders from the state of Florida.

cause order dated December 5, 1996, requesting interested parties to oppose or support the motion, and scheduled a hearing for December 13, 1996.[127] Following oral argument, the court denied Krell's motion. Krell subsequently filed a petition for mandamus with this court, again seeking recusal. That petition was denied without opinion on February 7, 1997. On appeal, Krell once more raises the issue of the district court's recusal. Once more, we shall reject it.

On appeal, Krell reasserts his claim that the district court should have recused itself based on its "tireless and unrelenting" bias in favor of the settling parties. According to Krell, "the District Court did what was necessary to impose upon Prudential's policyholders one sweeping class action resolution providing global peace for Prudential." Krell Reply Brief at 67. But Krell's briefs offer no new arguments in support of his claims. We review under

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[127] In an emergency motion to amend the Court's Order, Krell argued that the existing record was sufficient for the court to decide the recusal motion, and that supplementary evidence was improper. Krell's Brief in Support of Emergency Motion to Amend December 5, 1996 Show Cause Order at 1-2. On appeal, Krell argues that, under *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163-64 (3d Cir.1993), the district court improperly supplemented the then-existing record and allowed other parties to do the same. Krell Reply Brief at 68. We disagree. In its decision granting a petition of mandamus seeking the recusal of the district court judge, the *Alexander* court specifically considered evidence which was not part of the record at the time the initial motion to recuse was filed. In particular, the court examined a letter written by the district court judge in response to the petition for mandamus, and found that the letter gave the appearance that the judge was biased against the moving party. 10 F.3d at 165-66.

an abuse of discretion standard. *United States v. Antar*, 53 F.3d 568, 573 (3d Cir.1995).

B. *Legal Standard*

The Krell objectors brought this motion under 28 U.S.C. §§ 455(a), 455(b)(1) and 455(b)(5)(iv).[128] A party seeking recusal need not show actual bias on the part of the court, only the possibility of bias. *Liteky v. United States*, 510 U.S. 540, 553, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). But, as we noted in *Antar*, "[b]iases stemming from facts gleaned during judicial proceedings themselves must be particularly strong in order to merit recusal." 53 F.3d at 574. The court must "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555, 114 S.Ct. 1147. Under § 455(a), "if a 'reasonable man, were he to know all the circumstances, would harbor doubts about

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[128] These subsections of 28 U.S.C. § 455 provide:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) [The judge] shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(5) He or his spouse . . . :

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

the judge's impartiality' under the applicable standard, then the judge must recuse." *Antar*, 53 F.3d at 574 (quoting *In re Larson*, 43 F.3d 410, 415 (8th Cir.1994)).

C. *Krell's Arguments on Appeal*

With these standards in mind, we now examine Krell's specific arguments.

1. Ex Parte Meetings

First, Krell argues the court's remarks at an October 1996 hearing indicate the district judge had an off-the-record discussion of alleged document destruction with Attorney David Gross, counsel to former Prudential employee David Fastenberg. At that hearing, the judge stated that "Fastenberg's own lawyers say there was no document destruction." Tr. of Hearing, Joint App. at 1975. According to Krell, this was an acknowledgment that the court "had obtained off-the-record factual information concerning a material and disputed evidentiary matter (document destruction) then before it." Krell Brief at 17. We cannot agree.

Prudential fired Fastenberg for allegedly allowing the destruction of documents in the office he supervised. In response, Fastenberg filed a wrongful termination suit against Prudential, denying his involvement in any document destruction. Consequently, Fastenberg's denial was already a matter of public record. In addition, as noted by the district court at the recusal hearing, Fastenberg's termination and his subsequent lawsuit were widely reported in the press. Joint App. at 4728; *see also* Joint

App. at 11421-11438. Finally, Krell has offered no other evidence to support his contention that the district judge had an improper, *ex parte* meeting with Fastenberg's attorney. Based on the record before us, we se [sic] no abuse of discretion.

2. The Conference With State Insurance Regulators

Krell also claims the district court held an improper, nonjudicial conference with insurance regulators and the news media on October 16, 1996, in order to discuss the proposed settlement. Krell claims that notice of this meeting was not provided to counsel of record, and thus he was deprived of the opportunity to present the court and the regulators with class concerns and objections. In addition, Krell takes issue with several statements made by the district court at the conference.

The district judge addressed Krell's concerns about the content of the October 16 meeting during the recusal hearing, noting that "the Court did not request the meeting, nor did it set the agenda." Joint App. at 4725. The meeting was organized by Lead Counsel and counsel for Prudential, and the insurance regulators were invited by the "New Jersey Insurance Regulators." *Id.* Lead Counsel explained the meeting was called in mid-October to address the possibility of merging the two then-pending settlements – the Task Force settlement and the proposed national class settlement. The Task Force settlement called for Prudential to begin sending class notices and election forms to policyholders by November 1, 1998. The meeting on October 16 was called to discuss timing issues

related to the November notice deadline and the Rule 23 approval process. Both Prudential and Lead Counsel contend the October 16 conference transcript demonstrates that the adequacy of the settlement was not discussed during this meeting.

Once again, we see no abuse of discretion. As the settling parties note, and a review of the transcript confirms, the adequacy of the settlement was not discussed at the October 16 meeting. The primary issue considered by the parties at that conference was the timing of the notice Prudential was required to send under the Task Force Plan. The district court gave no indication that his decision was contingent upon or affected by Prudential's obligations under the Task Force plan. Consequently, Krell was not prejudiced by his counsel's absence.

Krell next accuses the district court of using "an off-the record procedure to convene" the October 16, 1996 conference. Krell Brief at 18 n. 19. According to Krell, "there is no record as to how, when and why this conference came about, [and] there is no record which reflects why the Court determined not [sic] to inform various *non-party* insurance regulators and news reporters but not interested parties including Krell." *Id.*

This statement is untrue. As the district court explained, the October 16 meeting was organized by Lead Counsel and Prudential, not the district court. Consequently, the court did nothing to prejudice Krell.[129]

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[129] In addition, Lead Counsel argues that Krell's counsel was not counsel of record in this case and thus was not entitled to notice of the conference. At the recusal hearing, the district

Krell also objects to the district judge's reference to the proposed settlement as "my settlement." Krell claims that Judge Wolin demonstrated a bias in favor of the settlement when he "exhorted" those present to "hang together [so that we may] accomplish what we have to accomplish for all our respective interests."

We accept the district court's explanation that he was merely using the expression "my settlement" as a convenient method to distinguish between the Proposed Settlement and the Task Force Settlement. Joint App. at 4726. At the October 16th hearing, the district court made it clear that it had not yet made any decisions regarding the terms of the proposed settlement or the proposed settlement class. "No one should leave here today thinking that Judge Wolin's silence, Judge Wolin's nod, a smile at a particular time, means that he will approve this settlement. I don't have the slightest idea. I don't know who the objectors are. I haven't heard any evidence." Tr. of October 16 Hearing at 38. Clearly, Krell's allegation has no merit.

3. *Rutt v. Prudential*

Third, Krell argues the district court attempted to influence the Pennsylvania state court proceeding in *Rutt v. Prudential*, scheduled before Judge Allison in the Court of Common Pleas for Lancaster County. According to Krell, the record indicates that Prudential's attorney

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court observed that "Mr. Malakoff, on behalf of Kittle and Krell, has consistently maintained that he is not part of the national class action." Joint App. at 4721.

informed Judge Allison that the district judge was "receptive to a discussion" with Judge Allison regarding potential ethical improprieties implicating both cases. Krell also claims that, at the show cause hearing on December 2, 1996, "Judge Wolin stated he could speak with any state court and saw nothing wrong with the use of the Court's name in the way it was used by Prudential to influence Judge Allison in *Rutt*." Krell Brief at 18-19. The settling parties note the district court expressly denied attempting to influence Judge Allison. *See* Tr. of December 2, 1996 Show Cause Hearing at 6-7.

In late 1996, Prudential moved to disqualify Bruce Miller, lead counsel in the parallel actions filed against Prudential by a group of former Prudential agents, on the grounds that Miller had arranged for one of his clients to be paid for testimony in a state court action against Prudential in Alabama. The district court requested and received from Mr. Miller certain documents relating to the Alabama case of *Key v. Prudential* and reviewed those documents in camera. Concerned that the documents raised certain ethical concerns, the district court issued an order to show cause on November 20, 1996 why those documents should not be released to Prudential. Prudential, concerned about Miller's representation in the Pennsylvania state court case *Rutt v. Prudential*, sought to raise the issue of possible ethical improprieties with Judge Allison. During an on-the-record conference in Judge Allison's chambers, Harold Hirshman, Prudential's attorney and a partner of Prudential's counsel in this matter, provided Judge Allison with a copy of the district court's November 20th letter and show cause order with respect to Mr. Miller. Mr. Hirshman also informed Judge Allison

that "[t]he one thing we did learn in addition to what I've already said, or my office learned, I did not speak to Judge Wolin's office myself, is that Judge Wolin is receptive to a discussion with Your Honor by telephone about his views, and we have no objection to that telephone call going ahead." Tr. of November 26, 1996 Hearing in *Rutt v. Prudential* at 4. Mr. Hirshman goes on to suggest that Judge Allison "place such a call to Judge Wolin and see what he has to say." *Id.* at 5. According to Krell, this was a clear attempt by the district court to influence the *Rutt* litigation, and demonstrates a bias in favor of Prudential.

We disagree. We do not impute any bias to the district court. There is no indication the district court asked Mr. Hirshman to make such a representation to Judge Allison. On the contrary, during the show cause hearing on December 2, 1996, the district court explicitly stated that he did "not send any representative to see Judge Allison in the Pennsylvania case of *Rutt v. Prudential.*" Tr. of December 2, 1996 Show Cause Hearing at 6-7. According to the district judge, he had merely stated that, if a state court judge called him, he would speak to that judge "as a matter of courtesy." *Id.* at 7. There is nothing in the record, save the statements made by Mr. Hirshman, to support Krell's contention. Finally, we note that we see nothing wrong with members of the federal and state judiciary trying to coordinate where their cases overlap. Coordination among judges can only foster the just and efficient resolution of cases.

There is no basis for believing the district court was attempting to influence the state court proceedings in

Rutt. Krell's claims, now before us for the second time, are clearly without merit. We find no abuse of discretion here.

The resolution of a class action, especially one as large as this, is never a simple task. Based on our review of the record, we note the extraordinary manner in which the district judge addressed the complex legal and factual issues raised by this case and handled the myriad procedural and administrative responsibilities which accompany a class action of this size.

VIII. CONCLUSION

For the foregoing reasons, we will affirm the certification of the proposed class and the approval of the settlement, and vacate and remand on the issue of attorneys' fees.

ROTH, Circuit Judge, concurring.

While I join in the majority's ultimate conclusion that the district court had jurisdiction over the claims of all classmembers, I respectfully disagree with its determination in subsection III.A.1 that the district court had supplemental jurisdiction by virtue of its federal question jurisdiction over the federal securities claims of named plaintiff, Martin Dorfner. Only 30% of the absent classmembers have claims arising under federal law; the remaining classmembers assert claims under state fraud statutes. Under the Supreme Court's decision in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), courts may exercise supplemental jurisdiction only when the federal and state claims arise

from a common nucleus of operative fact. Thus, for example, supplemental jurisdiction may be asserted when the federal and state claims "are merely alternative theories of recovery based on the same acts." *Lyon v. Whisman*, 45 F.3d 758, 761 (3d Cir.1995) (quoting *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 479 (3d Cir.1979)).

In this case, the district court found the federal and state claims alleged by class members to be "inextricably intertwined" because they "are premised upon a common course of conduct by Prudential; all related to the same alleged company-wide development and implementation of patently fraudulent sales techniques." *In re the Prudential Ins. Co. of America Sales Practices Litigation*, 962 F.Supp. 450, 501 (D.N.J.1997). Although the injuries of all classmembers may arise from a common scheme to defraud, it is far from clear that all of their state claims share a common nucleus of operative fact with Dorfner's federal securities claims.

In contrast, I find the requirement of a common nucleus of operative fact would be satisfied if the basis for the application of supplemental jurisdiction was derived from the district court's diversity jurisdiction over the state law claims of the remaining named plaintiffs. These plaintiffs raise a more diverse array of claims than those alleged by Dorfner. As a group, their claims are representative of the claims of the class as a whole.

The majority opinion undertakes a detailed and well-reasoned analysis of the present uncertainty surrounding the use of diversity jurisdiction as a basis for supplemental jurisdiction in subsection III.A.2, only to avoid answering the ultimate question of whether the Supreme

Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), remains good law following the enactment of 28 U.S.C. §-1367. I would reach this question and would hold that under the plain language of § 1367, the amount-in-controversy requirement articulated in *Zahn* is no longer applicable to absent classmembers.

I am concerned that, by avoiding the question of whether § 1367 overrules *Zahn* and by basing its finding of jurisdiction on the securities claims, the majority establishes a dangerous precedent. I fear the majority's decision on jurisdiction risks opening the federal courts to a wide array of state claims whenever a complaint incorporates both federal and state claims, no matter how tangentially related the state claims might be to federal claim upon which jurisdiction is based. As this Court wrote in *Lyon*, "when a court exercises federal jurisdiction pursuant to a rather narrow and specialized federal statute it should be circumspect when determining the scope of its supplemental jurisdiction." 45 F.3d at 764.

Accordingly, I join with the majority in holding that the district court had jurisdiction over the claims of all classmembers, but I do so based on my determination that supplemental jurisdiction can be derived from the diversity claims of the named plaintiffs.

Supreme Court, U.S.
FILED
98 819 NOV 16 1998
OFFICE OF THE CLERK

No. 98-___

In The

Supreme Court of the United States

October Term, 1998

RICHARD P. KRELL, et al.,

Petitioners,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II, PAGES 161 TO 458

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No. MDL 1061.
Civil Action No. 95-4704.

United States District Court.
D. New Jersey.

March 17, 1997.

(Appearances of counsel are listed in Appendix A)

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WOLIN, District Judge.

INTRODUCTION

The Prudential Insurance Company of America, the institution that for years has represented itself as the quintessence of stability, the Rock, used pervasive and systematic deceptive sales tactics to sell many individuals a great number of life insurance policies, to the benefit of Prudential and its sales agents, but to the detriment of trusting consumers. The old adage resounds true: insurance is not bought; it is sold. And through selling consumers "a piece of the rock," Prudential ultimately

crushed the hopes and expectations of many policyholders with the colossal weight of hidden fees and costs. Prudential forced many individuals to pay amounts that far exceeded their means, and caused others to lose the policies that they had worked so long and so hard to build.[1]

The plaintiffs now ask the Court to help them alleviate the burdens that they allege Prudential has forced upon them. Plaintiffs seek class certification under Federal Rule of Civil Procedure 23(b)(3) and request this Court to approve the proposed class settlement as memorialized in the Stipulation of Settlement dated October 28, 1996, and amended by the Amendment to the Stipulation of Settlement dated February 22, 1997 ("Stipulation Amendment") and by this Court's Order of February 3, 1997 (collectively the "Proposed Settlement").

The Court finds that the facts at bar compel class certification. Unlike Georgine, the typicality, adequacy of representation, predominance, and superiority requirements are clearly met.[2] With regard to typicality and

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[1] The observations contained in this paragraph are a synthesis of voluminous submissions to the Court. Because the case was settled before trial, Prudential did not avail itself of the opportunity to submit contrary evidence and does not concede the verity of these observations. Accordingly, these remarks shall have no *res judicata* effect.

[2] *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.) (holding that proposed settlement class in asbestos personal injury action did not satisfy Federal Rule of Civil Procedure 23 adequacy of representation, typicality, or predominance requirements where exposure-only futures claimants were not adequately represented and where multiple defendants and

adequacy of representation, all class members allegedly were uniformly injured by Prudential's deceptive sales practices and there are no "futures claimants." Additionally, Class Counsel have tenaciously represented all class members equally. With regard to predominance and superiority, Prudential's alleged common scheme to defraud its policyholders has created a plethora of common factual and legal issues, which dramatically outweigh any individual issues. This is a commercial dispute involving purely economic damages and no personal injuries. And, as recommended by *In re School Asbestos Litigation*,[3] Class Counsel have grouped potentially applicable state laws systematically into manageable patterns, completely obviating potential complications from choice of law differences.

Not only do the facts at bar compel class certification, but, beyond a doubt, the Proposed Settlement is fair, reasonable, and adequate in light of the many factors that this Court must consider. The Proposed Settlement's alternative dispute resolution process will provide many claimants the choice between obtaining (1) full rescission and restitution or (2) full benefit of the bargain relief. Importantly, the Proposed Settlement relief is uncapped; all class members may obtain full remediation, regardless of the benefits allocated to other class members. And substantial minimum payment guarantees secure Prudential's commitment to compensate policyholder claims.

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widely divergent claims would pose an obstacle to trial), *cert. granted sub nom., Amchem Prods. Inc. v. Windsor*, ___ U.S. ___, 117 S.Ct. 379, 136 L.Ed.2d 297 (1996).

[3] 921 F.2d 1310 (3d Cir.1990).

Indeed, the Proposed Settlement is extraordinary because class members have relatively modest individual claims that would be impracticable to redress individually.

The fairness of the Proposed Settlement is also confirmed by the fact that all fifty states and the District of Columbia have found that the Proposed Settlement, or the preceding plan, the Task Force Plan, is fair, reasonable, and adequate to compensate fairly, fully, and quickly their constituents whom Prudential misled.

Consequently, based upon the evidence of record,[4] the Court's findings of fact and conclusions of law,[5] and for the reasons stated herein, the Court concludes that all of the requirements of Federal Rule of Civil Procedure 23 have been met and that the Proposed Settlement of this class action is fair, reasonable, and adequate for the class and, therefore, should be approved. Today's Opinion and Order affirms, explains, and supplements the Court's

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[4] The Court has considered all objections, briefs, affidavits, charts, and other materials that the parties, objectors, amicus curiae, and other individuals and entities have submitted. The Court discusses in this Opinion only those facts that it finds relevant. And the Court addresses only objections that somehow elucidate the propriety of class certification or the fairness of the Proposed Settlement. The Court either implicitly or expressly addresses nearly all of the objections, some not even palpably meritorious, in the interest of developing a full record. The Court has declined to address specifically some objections that are unpersuasive on the issues of the propriety of class certification or the fairness of the Proposed Settlement. Any objections not specifically addressed are rejected.

[5] The Court has considered an ample record. For a short list of some materials that the Court has considered, *see* Appendix B.

Memorandum Opinion and Order issued on March 7, 1997.

FINDINGS OF FACT[6]

I. The Plaintiffs, the Defendants, the Objectors, and Various State Insurance Representatives Participated in These Proceedings.

A. The Class Includes All Persons or Entities Who Owned Certain Life Insurance Products During the Class Period.

1. The class encompasses, with some exceptions,[7] all persons or entities who owned one or more of

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[6] Sections I and II of these Findings summarize plaintiffs' allegations in their Second Amended Complaint. These are not findings on the merits. For the purposes of class certification, the Court must not address the merits of plaintiffs' claims.

Similarly, in addressing the fairness of the Proposed Settlement, the Court's inquiry is limited to a determination of the Proposed Settlement's fairness, reasonableness, and adequacy. From the Second Amended Complaint and the evidence that the plaintiffs have proffered, the Court determines the following findings of fact for purposes of class certification and approval of the Proposed Settlement only.

To the extent that any findings of fact include conclusions of law, or vice versa, and to the extent that the Opinion contains mixed findings of fact and conclusions of law, the Court hereby adopts all of its findings of fact and conclusions of law.

[7] The class excludes: (1) policyholders who were represented by counsel and who signed a document in connection with a settlement of a claim, action, lawsuit or proceeding, pending or threatened, that released Prudential with respect their policies; (2) policyholders that are corporations, banks, trusts, or other non-natural entities that purchased policies as corporate or trust-owned life insurance

Prudential's new or additional insurance policies between January 1, 1982 and December 31, 1995 (the "Class Period"). Stipulation of Settlement at 13, ¶ A.1.at. Approximately eight million class members own approximately 10.7 million insurance policies.[8]

B. The Plaintiff Representatives Are Typical Victims of Prudential's Deceptive Sales Practices During the Class Period.

1. Carol Nicholson Was Victimized by of [sic] Churning, Vanishing Premium Tactics, and Investment Plan Tactics.

2. Plaintiff Carol Nicholson, executrix of the estate of decedent Keith E. Nicholson is an Illinois citizen. Consolidated Second Amended Class Action Complaint and Jury Demand ("Second Am. Compl.") at ¶ 13. Keith Nicholson was a brick mason, while Carol Nicholson is a retired K-Mart personnel manager. Second Am. Compl. at ¶ 107. Carol and Keith Nicholson purchased four life insurance policies between 1966 and 1984 with death benefits totaling approximately $30,000 (the "original policies"). Second Am. Compl. at ¶ 106. In 1986, Keith Nicholson purchased from Prudential a $100,000 whole

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and under which either (a) there are fifty or more separate insured individuals, or (b) the aggregate premium paid over an eight year period, ending with the close of 1996, exceeds one million dollars; and (3) policyholders who were issued policies in 1995 by Prudential Select life Insurance Company of America. Stipulation of Settlement at 13, ¶ A.1.at.

[8] Throughout this Opinion, the Court will refer to potential class members as "class members." The phrase is not intended to reify the class; rather, the phrase is a tool of convenience.

life insurance policy (policy number 76460936), allegedly as a result of Prudential's common scheme. Second Am. Compl. at ¶ 13. Carol Nicholson alleges churning, vanishing premium, and investment plan claims. Second Am. Compl. at ¶¶ 106-19.

3. In 1984, Prudential agent Homer Gernigan contacted the Nicholsons and advised them that they could use the dividends and earnings from the original policies to "work for them" in connection with their estate and retirement planning. Second Am. Compl. at ¶ 108. Gernigan further advised the Nicholsons that they could acquire additional insurance by paying the premiums on the additional policy with the earnings from the original policies, with no additional out-of-pocket costs. Second Am. Compl. at ¶ 108. Gernigan represented that the additional insurance would be needed for the Nicholsons' financial security during retirement or estate security for the Nicholsons in the event of Keith Nicholson's death. Second Am. Compl. at ¶ 108.

4. In 1984, in reliance on Gernigan's misrepresentations, the Nicholsons agreed to acquire a $100,000 whole life insurance policy (the "additional policy"). Second Am. Compl. at ¶ 110. Gernigan told the Nicholsons that to apply the earnings from the original policies to the premiums for the additional policy, Keith Nicholson had to sign certain Prudential forms in blank. Second Am. Compl. at ¶ 112. Keith Nicholson did. just that. Second Am. Compl. at ¶ 112. Unknown to the Nicholsons, these forms authorized loans from the cash value of the Nicholsons' original policies. Second Am. Compl. at ¶ 113.

5. Subsequently, the Nicholsons received notices from Prudential indicating that policy loans had been taken and the additional policy had lapsed. Second Am. Compl. at ¶ 114. The Nicholsons contacted Prudential, which advised them to ignore the notices. Second Am. Compl. at ¶ 115.

6. Keith Nicholson was diagnosed with leukemia in 1989 and died on August 26, 1994. Second Am. Compl. at ¶ 117. At the time of Keith Nicholson's death, Carol Nicholson learned that, because of Prudential's misrepresentations and omissions, his $130,376 in insurance coverage had dwindled to $22,514.43. Second Am. Compl. at ¶ 118. Carol Nicholson learned that Keith Nicholson's additional policy had lapsed and that unauthorized loans had substantially diminished the available death benefits of the other policies. Second Am. Compl. at ¶ 118. Carol Nicholson also learned of Gernigan's material omissions and misstatements in selling the Nicholsons the additional policy: (1) that loans were made on the cash value of the original policies to pay the premiums on the additional policy; (2) that these loans would diminish the cash values and death benefits of the original policies; (3) that despite Gernigan's representations, the earnings and dividends on the original policies were insufficient to pay the premiums and other charges of the additional policy; (4) that the earnings, dividends, and cash values of the original policies would dissipate; and (5) that without additional premium payments the additional policy would lapse. Second Am. Compl. at ¶ 118. Carol Nicholson, as the executrix for the Estate of Keith Nicholson, sued Prudential on February 6, 1995. Second Am. Compl. at ¶ 119.

2. Martin Dorfner Was Victimized of Churning and Vanishing Premium Tactics

7. Plaintiff Martin Dorfner is a Pennsylvania citizen. Second Am. Compl. at ¶ 14. He and his wife operate a small grocery store. Second Am. Compl. at ¶ 120. In April of 1991, Dorfner purchased from Prudential a $50,000 variable appreciable life insurance policy (policy number 97-522-008), allegedly as a result of Prudential's common scheme. Second Am. Compl. at ¶ 14. Dorfner alleges damages from churning and his purchase of a vanishing premium policy. Second Am. Compl. at ¶¶ 120-46.

8. As of July of 1989, Martin and Audrey Dorfner had purchased several Prudential life insurance policies to insure Martin including a $100,000 term life policy (policy number 73-438-990), a $5,000 whole life policy (policy number 22-218-366), and an essentially paid-up policy having a death benefit of $3,000. Second Am. Compl. at ¶ 124. Additionally, Audrey was insured by a Prudential $10,000 whole life policy (policy number 73-381-858) and the Dorfner's children were insured: Martin, Jr. for $5,000 (policy number 24-749-189), Brian for $5,000 (policy number 25-501-819), Donald for $5,000 (policy number 25-233-873), and Denise for $5,000 (policy number 25-233-872). Second Am. Compl. at ¶ 124.

9. In July of 1989, Prudential agent Susan Sheldon met with the Dorfners to review their coverage. Second Am. Compl. at ¶ 125. As trained by Prudential, Sheldon advised the Dorfners that Martin Dorfner would be entitled to a "free" insurance policy by using the dividends from his $3,000 policy. Second Am. Compl. at ¶ 125. In

reliance on Sheldon's misrepresentations, the Dorfners agreed to complete the paperwork for the "free" policy. Second Am. Compl. at ¶ 126.

10. That month, Prudential issued another whole life policy in Martin Dorfner's name (policy number 73-831-273) (the "free policy"). Second Am. Compl. at ¶ 127. The Dorfners never received any policy documents or other information regarding the amount of death benefits provided by the "free" policy. Second Am. Compl. at ¶ 128.

11. The Dorfners later learned that in July of 1989, without authorization, Sheldon withdrew $300.50 from Martin's original $3,000 policy to pay for his "free policy." Indeed, Sheldon continued to withdraw funds each year thereafter until 1993. Second Am. Compl. at ¶ 128. The Dorfners also discovered that in April of 1991 a living needs rider had been added to the "free policy" without their knowledge.

12. In the spring of 1991, Prudential's Vice-President of the District Agencies sent Martin Dorfner a form Notice marked "important" and a copy of the computer printout of policy information. Second Am. Compl. at ¶ 129. The Notice stated that a Prudential representative would contact Dorfner to review the circled "convertible amount" of his term policy. Second Am. Compl. at ¶ 129.

13. In March of 1991, Sheldon approached Martin Dorfner regarding conversion of the term policy and presented Martin Dorfner with an offer to convert his term policy to a "new" Prudential Variable Appreciable Life ("VAL") policy. Second Am. Compl. at ¶ 130. Sheldon showed Martin Dorfner deceptive illustrations and

explained that the VAL policy was superior to his term coverage, because the VAL was a whole life product. Second Am. Compl. at ¶ 131. Sheldon also explained that the VAL was a financial savings because the premiums could be expected to be completely paid within eight years by using the dividends of the Dorfners' other policies. Second Am. Compl. at ¶ 131. Sheldon told the Dorfners that the childrens' policies were essentially paid-up and that she would administer the dividend application to the new policy. Second Am. Compl. at ¶¶ 132-33. Relying on Sheldon's presentation, Martin Dorfner agreed to apply for a $50,000 VAL policy. Second Am. Compl. at ¶ 135. As trained by Prudential, Sheldon did not leave copies of the illustrations or any prospectus for the new VAL with the Dorfners. Second Am. Compl. at ¶ 134. In fact, Prudential never provided the Dorfners with a copy of the VAL policy. Second Am. Compl. at ¶ 137.

14. In July of 1992, unknown to the Dorfners, without authorization, and contrary to Sheldon's earlier representations, Sheldon took a $680.61 loan against Martin Dorfner's $5,000 whole life policy (policy number 22-218-366). Second Am. Compl. at ¶ 138. In 1993, Sheldon took another $300.50 loan, this time from policy number 73-831-273, the "free policy." Second Am. Compl. at ¶ 139.

15. On March 8, 1994, Prudential advised Martin Dorfner that a new agent would be servicing his account. Second Am. Compl. at ¶ 140. Soon thereafter, the new agent told Martin that an unauthorized loan had been made against his original policy and applied to the VAL policy. Second Am. Compl. at ¶ 140. The agent also

advised Martin that Audrey's policy and the childrens' policies were in danger of lapsing because the dividends and cash value had been applied to the premiums of the VAL. Second Am. Compl. at ¶ 141. Prudential admitted in letters to Martin dated August 11, 1994 and September 13, 1994 that the loans taken to fund the VAL were not authorized. Second Am. Compl. at ¶ 142. Martin Dorfner sued Prudential on January 19, 1995. Second Am. Comp. at ¶ 146.

3. Vincent and Elizabeth Kuchas Were Victimized by Churning and Investment Plan Tactics

16. Plaintiffs Vincent and Elizabeth Kuchas (the "Kuchases") are Connecticut citizens. Second Am. Compl. at ¶ 15. In 1987, Elizabeth Kuchas purchased a $100,000 variable appreciable life insurance policy (policy number R0147600) and Vincent Kuchas purchased an $80,000 variable appreciable life insurance policy (policy number R0147606) from Prudential allegedly as a result of Prudential's common scheme. Second Am. Compl. at ¶ 15. The Kuchases allege churning and investment plan based fraudulent sales practices. Second Am. Compl. at ¶¶ 147-59.

17. Vincent Kuchas has retired, after working for thirty-seven years as a roofer. Second Am. Compl. at ¶ 147. Elizabeth Kuchas's occupation is unknown. On November 5, 1983, Vincent Kuchas purchased a variable life insurance policy from Prudential with a face amount of $46,908. Second Am. Compl. at ¶ 148. On November

11, 1987, Elizabeth Kuchas purchased a variable life policy from Prudential with a face amount of $40,000. Second Am. Compl. at ¶ 148. These polices are the "initial policies." Second Am. Compl. at ¶ 148.

18. In December of 1987, Prudential agent Richard Dings recommended that the Kuchases purchase new life insurance. Second Am. Compl. at ¶ 149. The Kuchases told Dings that they wanted a retirement investment similar to an IRA, not just additional life insurance. Second Am. Compl. at ¶ 149. The Kuchases also informed Dings that they could not afford an investment plan if they had to continue to pay premiums on the initial policies. Second Am. Compl. at ¶ 149. Dings proceeded to conceal from the Kuchases all of the adverse information that agents commonly withheld from customers to churn them. Second Am. Compl. at ¶ 150. On December 1, 1987, relying on Dings' representations, particularly as to financing terms, the Kuchases purchased two VAL policies (the "1987 VALs"). Second Am. Compl. at ¶ 152. Prudential provided no prospectus at the time of sale. Second Am. Compl. at ¶ 152.

19. In early 1988, the Kuchases began to receive information suggesting that further premiums would be due on the initial policies. Second Am. Compl. at ¶ 154. Dings repeatedly assured the Kuchases that they need only pay what they could afford on the initial policies to keep up the 1987 VALs and that the 1987 VALs were still good "IRA investments." Second Am. Compl. at ¶ 154. Relying on these false assurances, the Kuchases continued to make small monthly payments in amounts they could afford toward the premiums on the initial policies. Second Am. Compl. at ¶ 155. Unknown to the Kuchases,

however, Prudential did not credit these partial payments. Second Am. Compl. at ¶ 155. In February of 1994, when the Kuchases discovered that Prudential had not accepted their partial payments, Dings told the Kuchases not to worry and that he would take care of it. Second Am. Compl. at ¶ 155.

20. In September of 1994, the Kuchases learned that the initial policies had lapsed for non-payment of premiums, and that Dings had taken out loans against the initial policies to pay premiums on the 1987 VALs. Second Am. Compl. at ¶ 156. Consequently, the Kuchases had to pay additional funds to have the initial policies reinstated and to keep the 1987 VALs in force. Second Am. Compl. at ¶ 157. The Kuchases sued Prudential on February 28, 1995. Second Am. Compl. at ¶ 157.

4. Norman Gassman Was Victimized by Vanishing Premium and Investment Plan Tactics

21. Plaintiff Norman Gassman is an Ohio citizen. Second Am. Compl. at ¶ 16. He manages a women's shoe store. Second Am. Compl. at ¶ 160. In August of 1992, Gassman purchased from Prudential a variable appreciable life insurance policy (policy number 98354001), allegedly as a result of Prudential's fraudulent scheme. Second Am. Compl. at ¶ 16.

22. In August of 1992, Gassman had $20,000 invested in a certificate of deposit when Prudential agent Ben Schwartz, who held himself out as a "financial planner" or "financial consultant," contacted him. Second Am. Compl. at ¶ 161. Schwartz misrepresented that a VAL policy was part of an "investment plan" that was

"better than a CD," that it would pay a higher rate of interest at low risk, and that the earnings on this investment would be tax-free. Second Am. Compl. at ¶ 162. Schwartz also misrepresented to Gassman that he would not be required to pay any premiums for the VAL policy because the VAL policy could reasonably be expected to yield enough dividend income to pay its own premiums in addition to providing a yield exceeding that which Gassman had earned on his Certificate of Deposit. Second Am. Compl. at ¶ 162. Although Schwartz disclosed to Gassman that some life insurance would be included with the VAL policy, he failed to disclose that the product was not an investment plan and that a substantial portion of the funds Gassman was "investing" would not, in fact, be invested. Second Am. Compl. at ¶ 165.

23. Relying on these misrepresentations, Gassman agreed to invest the money from his CD in the VAL policy. Second Am. Compl. at ¶ 164. During the following months, Gassman received notices from Prudential that contradicted Schwartz's representations. Second Am. Compl. at ¶ 166. When Gassman confronted Schwartz, he responded that Gassman should not worry because Gassman was being assessed special charges that would cease after the first two years. Second Am. Compl. at ¶ 166.

24. In March of 1995, Gassman discovered that the VAL policy was not an investment plan, that he had paid undisclosed fees and commissions to Prudential and its agent, and that Prudential had concealed that its dividend scales would not perform as represented. Second Am. Compl. at ¶ 167. Gassman sued Prudential on May 25, 1995. Second Am. Compl. at ¶ 168.

C. The Court Has Granted the Requests of Several Class Members to Intervene

25. The Court granted the motions of objectors Treadway, Parnell, and Ginsberg to intervene in Scheduling Order No. 6, dated January 6, 1997 and the Court granted the motion of objectors Kathryn Johnson and Richard Johnson to intervene in the Court's Order of January 29, 1997.

D. Plaintiffs Sued Prudential, a Mutual Life Insurance Company and One of the Largest Life Insurance Companies in the Country

26. Prudential is a corporation organized under the laws of New Jersey, and has its principal office at 751 Broad Street, Newark, New Jersey. Second Am. Compl. at ¶ 17. Prudential is a mutual life insurance company, meaning that it is owned by its policyholders by virtue of their ownership of Prudential products. Second Am. Compl. at ¶ 19. Unlike other corporate forms, a mutual life insurance company has no shareholders. Prudential was formed in 1873 and is one of the oldest and largest life insurance and annuity companies in the United States. Second Am. Compl. at ¶ 19. As such, Prudential does business in all fifty states and employs over 20,000 full-time professional career agents in the United States and Canada. Second Am. Compl. at ¶ 20. Prudential also uses other distribution networks to sell its financial products. Second Am. Compl. at ¶ 20.

27. Prudential has invited public trust and confidence in its integrity and skills by using national advertising and standardized sales presentations that portray

the Rock of Gibraltar as Prudential's service mark and that refer to Prudential products as a "piece of the Rock." Second Am. Compl. at ¶ 20.

E. Plaintiffs Have Also Sued Several Individual Defendants Who Were Upper Echelon Prudential Managers

28. The individually named defendants include Robert A. Beck, Ronald D. Barbaro, and Robert C. Winters. Beck is a New Jersey citizen. He was Prudential's President from 1972 to 1979, and its Chairman and CEO from 1978 to 1987. Second Am. Compl. at ¶ 18(a). Barbaro is a Canadian citizen. He was Prudential's President from 1990 to 1992. Second Am. Compl. at ¶ 18(b). Winters is a New Jersey citizen. He was Prudential's Chairman and CEO from 1987 to 1993 and its Chairman, CEO, and President from 1993 to 1994. Second Am. Compl. at ¶ 18(c).

F. Several State Government Representatives Have Contributed to These Proceedings

29. The Court has allowed several states to participate in these proceedings because the states have expressed strong interests in the outcome. The Court has permitted the California Insurance Commissioner and the Florida Insurance Commissioner to appear as *amicus curiae*. Order dated February 3, 1997. The Court has permitted the Massachusetts Insurance Commissioner, the Massachusetts Attorney General, and the Texas Insurance Commissioner to intervene pursuant to Federal Rule of Civil Procedure 24(b). *Id.* The Court has recognized that

the Florida Attorney General has standing to appear before the Court as an objector to the Proposed Settlement. *Id.* And, although the Court has not formally addressed the status of the New Jersey Department of Insurance in these proceedings, the Court has permitted the department *amicus curiae* status, on behalf of the department itself and on behalf of the Multi-State Life Insurance Task Force. *See infra* section III.B.

30. California, Florida, Massachusetts, and Texas initially filed objections to the Proposed Settlement. Between February 20 and 22, 1997, all four of these states settled with Prudential, or signed letters of intent to do so, and withdrew their objections to the Proposed Settlement. At that time, Prudential agreed to additional enhancements (the "Final Enhancements") to the Proposed Settlement. Because of these additional enhancements, the four previously objecting states now find that the Proposed Settlement is fair, reasonable, and adequate and fully protective of the rights of their citizens.[9] These Final Enhancements have been incorporated into the Proposed Settlement to benefit class members in all states.[10]

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[9] Although the holdout states – California, Florida, Massachusetts, and Texas – have withdrawn their objections, the Court is aware that the change in these states' views may not be purely attributable to the Final Enhancements and a change of heart. The Court observes that in addition to the Final Enhancements, the holdout states also negotiated significant fines and penalties that add to state coffers, but that do not directly benefit class members. For example, Florida obtained from Prudential $15 million in fines and penalties and California obtained $15.4 million.

[10] The Court finds that the Proposed Settlement is fair, reasonable, and adequate without the Final Enhancements.

II. Plaintiffs Allege that Prudential Conducted a Scheme to Deceive Policyholders into Buying Prudential Life Insurance Products

31. Prudential engaged in a systematic fraudulent marketing scheme in which its agents wrongfully induced policyholders to purchase certain Prudential life insurance policies. Second Am. Compl. at ¶ 5. Prudential implemented its scheme through the use of false and misleading sales presentations, policy illustrations, marketing materials, and other information that Prudential approved, prepared, and disseminated to its nationwide sales force. Second Am. Compl. at ¶ 5.

32. Prudential sells primarily three types of financial products: (1) life insurance policies (term, whole life, and combinations of these), (2) annuities, and (3) investments through its securities subsidiary. Second Am.

Nevertheless, where the Final Enhancements affect a specific provision of the Proposed Settlement, the Court will discuss the changes as appropriate.

Class members have already received adequate notice both of the pendency of this class action and of the Proposed Settlement. Class members need not be informed of the Final Enhancements to the settlement because the Proposed Settlement is only more valuable with these changes. Plainly, class members who declined to opt out earlier, would not choose to do so now.

Moreover, class members who opted out may now desire to participate in the Proposed Settlement, given the added value of the Final Enhancements. For this reason, the Court will order that a special notice be sent to the opt-outs to permit them to reevaluate their choices.

Compl. at ¶ 21. Prudential's whole life insurance products consist of both traditional whole life policies and VAL polices. Second Am. Compl. at ¶ 21.

33. Prudential prepares, underwrites, and issues all of its products from Prudential's New Jersey headquarters. Second Am. Compl. at ¶ 22. Prudential also provides or approves all sales presentations, policy illustrations, and other information used to sell insurance to the public. Second Am. Compl. at ¶ 22. Prudential supplies its agencies with preapproved materials including product brochures, pre-call letters, computer-based sales and illustration systems, seminar materials, and newspaper advertisements. Second Am. Compl. at ¶ 22. Prudential prohibits its agents from using any advertising or marketing materials that Prudential has not first approved. Second Am. Compl. at ¶¶ 22-23.

34. Beginning in the early 1980's, Prudential used its centralized marketing system to implement a scheme to sell new insurance polices to existing and new customers through three deceptive sales tactics: "churning," "vanishing premium," and "investment plan" techniques. Second Am. Compl. at ¶ 25.

A. Prudential Used a Deceptive Sales Practice Called "Churning" to Sell Policyholders Replacement Policies

35. Prudential agents used "churning"[11] tactics to induce policyholders with significant cash values in

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[11] "Churning" in the life insurance context is also referred to as "twisting" or "piggybacking." Second Am. Compl. at ¶ 29.

existing policies to purchase new policies, thereby depleting the cash values of existing policies and diverting these values to Prudential. Second Am. Compl. at ¶¶ 30-40.

36. In the life insurance context, the term "churning" refers to the removal, through misrepresentations or omissions, of the cash value, including dividends, of an existing life insurance policy or annuity to acquire a replacement insurance policy.[12] Second Am. Compl. at ¶ 28. The value of the first policy may be reduced either by borrowing against the policy or by virtue of the policy's lapse. Second Am. Compl. at ¶ 28. Churning often results in financial detriment to the policyholder, a financial benefit to the agent by virtue of a large commission on the first year premium, and administrative charges being paid to the insurer. Second Am. Compl. at ¶ 29.

37. Prudential and the individual defendants trained Prudential's nationwide sales force to convince existing policyholders to use the cash values and/or dividends of existing polices to purchase replacement insurance policies with purportedly greater death benefits and cash values. Second Am. Compl. at ¶ 30. Prudential carried out its scheme through informing agents of, among other policyholder information, the amount of accumulated cash values in existing policies. Second Am. Compl. at ¶ 31. Prudential agents used this information to target elderly persons who had cash values in existing policies. Second Am. Compl. at ¶ 32. On June 5, 1995, Prudential

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[12] A replacement policy is a policy financed through using equity, cash value, dividends, interest, or premiums from an existing policy. Second Am. Compl. at ¶ 26.

finally announced to its agents that they were not to use specialized software to determine current policyholders' cash values or dividends. Second Am. Compl. at ¶ 51.

38. Prudential distributed to its agents software programs that contained numerous form letters to solicit business from then-existing customers. Second Am. Compl. at ¶ 33. Prudential also gave new agents a "book of business," which listed existing Prudential policyholders and illustrated each policyholder's built-up cash values and accumulated dividends, instructed the new agents to sell the existing policyholders additional insurance and replacement policies, and provided its agents with audio tapes to teach the agents to churn. Second Am. Compl. at ¶ 34.

39. The agents then used their knowledge of existing customers' cash values and their knowledge of how to churn to call on the existing customers and convince them to acquire new insurance policies. Second Am. Compl. at ¶ 35. Agents misrepresented that the new insurance could be acquired through using only dividends from existing policies and that the policyholder would receive additional coverage for little or no additional premiums. Second Am. Compl. at ¶ 36.

40. Additionally, Prudential trained its agents to ask the customer to sign one or more "disbursement request forms" in blank. Second Am. Compl. at ¶ 37. Prudential printed the forms and distributed them to its agents. Second Am. Compl. at ¶ 37. The forms allow policyholders to make policy loans, to execute dividend

option changes, to surrender paid-up additional insurance, to withdraw accumulated dividends, or to cash surrender the policy. Second Am. Compl. at ¶ 37.

41. Prudential trained its agents to complete the loan section of the disbursement request form to facilitate and conceal their churns. Second Am. Compl. at ¶¶ 38-40. The agent would indicate on the form that a loan would be used to pay premiums on other contracts and would, thereby, extend Prudential credit to the insured to cover the premiums to acquire a replacement policy. Second Am. Compl. at ¶ 38. The insured, thereby, could be led to believe for several years that the replacement policy provided increased death benefits without additional premiums. Second Am. Compl. at ¶ 40. When the existing policy cash values had been depleted by the loans, however, Prudential would then require the insured to pay the additional premiums. Second Am. Compl. at ¶ 40. If the insured was unable or unwilling to pay, the policies would lapse. Second Am. Compl. at ¶ 40.

42. Prudential compounded the injuries caused by its churning by classifying replacement policies as new policies. Second Am. Compl. at ¶ 41. This classification allowed Prudential and its agents to exact significantly higher fees and commissions than would be permitted in the case of a legitimate replacement transaction. Second Am. Compl. at ¶ 41.

43. Prudential was aware that replacement is rarely in the best interests of the policyholder because: (1) existing policy premiums are usually lower because a replacement takes place when the insured is in a less favorable underwriting class; (2) acquisition costs are

charged in the early years of a policy and the policyholder incurs these costs again with the replacement policy; and (3) replacement renews the risk that an incontestability or suicide clause will be incorporated into a policy. Second Am. Compl. at ¶ 44. Prudential's own corporate policy manuals purport to prohibit churning. Second Am. Compl. at ¶ 46.

44. Prudential required agents to give prospective policy purchasers a replacement disclosure form explaining that replacement is not typically in the policyholder's best interests, but agents routinely failed to do so. Second Am. Compl. at ¶ 47. Prudential repeatedly discouraged and inhibited its agents from providing adequate disclosures to the policyholders. Second Am. Compl. at ¶ 47. Moreover, Prudential's agent compensation system, which caused rapid agent turnover and a "produce or die" atmosphere, exacerbated the pressure to churn. Second Am. Compl. at ¶ 49.

45. Prudential trained its agents to extend the deception when they were contacted by policyholders who had received confusing paperwork from Prudential. Second Am. Compl. at ¶ 50. Policyholders would call Prudential when they received notices indicating that loans had been taken against their policies. Prudential trained its agents to advise customers "not to worry," "that the notice was a mistake," or that the agent "would take care of it." Second Am. Compl. at ¶ 50.

B. Prudential Misstated that the Premiums on Its Life Insurance Products, Including Abbreviated Payment Plan Policies, Would Vanish

46. Prudential agents used "Abbreviated Payment Plan" ("APP"), or "vanishing premium" policies, often in conjunction with churning, to sell permanent life insurance policies to class members; Prudential agents misrepresented that policyholders would have to pay no out-of-pocket premiums after a certain number of premium payments during the initial years of the policies. Second Am. Compl. at ¶¶ 52-61.

47. Prudential agents sold these APP policies to class members by using standardized sales presentations and written policy illustrations created from the hardware and software that Prudential distributed. Second Am. Compl. at ¶¶ 53, 55-56. Moreover, Prudential prepared and disseminated standardized sales presentations, scripts, and other materials to extol Prudential's APP policies. Second Am. Compl. at ¶¶ 52-56.

48. Prudential's standardized sales presentations and policy illustrations failed to disclose that the policy premiums would not vanish and that Prudential did not expect the policies to pay for themselves as illustrated. Second Am. Compl. at ¶ 56. Prudential's illustrations also did not inform policyholders of the assumptions on which the policy illustrations were based, assumptions which had no reasonable basis in fact. Second Am. Compl. at ¶ 56.

49. Agents frequently merged churning tactics and APP policies, forcing policyholders to pay the premium cost of the APP policy by dissipating the cash value of an

existing life insurance policy. Second Am. Compl. at ¶ 57. Agents would intentionally conceal this dissipation from the policyholders. Second Am. Compl. at ¶ 57.

50. Prudential failed to apprise policyholders of the enhanced risks that they assumed in purchasing Prudential life insurance polices in the 1980's. Second Am. Compl. at ¶ 58. At that time, Prudential created new classes of dividend participating individual life policies sensitive to then-existing interest rates, policies based on the so-called Income Generation Approach ("IGA"). Second Am. Compl. at ¶ 58. Prudential knowingly failed to disclose that these policies would suffer greater adverse consequences when interest rates declined and Prudential lowered its dividend rates to correspond with declining interest rates. Second Am. Compl. at ¶ 59. Whereas in previously written policies dividends were pooled with premium proceeds from policies invested over many years, these new policies were invested in a smaller pool and risked greater exposure to declining returns on Prudential investments. Second Am. Compl. at ¶ 59. Prudential agents used standardized illustrations that failed to disclose this enhanced risk. Furthermore, Prudential agents failed to explain the risk at the time of sale or afterward. Second Am. Compl. at ¶ 59.

51. Prudential's senior management knew early in the Class Period that the assumptions underlying the APP illustrations were fundamentally flawed, but continued to approve the sale of these policies to class members without adequate disclosures. Second Am. Compl. at ¶ 61.

C. Prudential Fraudulently Marketed Its Insurance Policies as Investment Vehicles

52. Prudential fraudulently marketed life insurance polices as "investment plans," "retirement plans," or similar investment vehicles. Second Am. Compl. at ¶¶ 62-71. Plaintiffs allege that Prudential agents failed to disclose that these purported "investment plans" were really standard life insurance policies, which carried costs and other components that materially and adversely differed from true investment or retirement plans. Second Am. Compl. at ¶¶ 62-71. These misrepresentations and omissions violated many applicable regulations prohibiting the sale of life insurance as an investment plan. Second Am. Compl. at ¶ 70.

53. Specifically, Prudential misrepresented to policyholders, through standard presentations and materials, that life insurance policies were equivalent to investment or savings accounts, pension maximization or retirement plans, college-tuition-funding plans, mutual funds, or other investment or savings plans. Second Am. Compl. at ¶ 62. Prudential's sales presentations did not even use the phrase "life insurance." Second Am. Compl. at ¶ 63. For example, Prudential used mailers and promotional brochures entitled "Guaranteed Income for Life," which did not indicate that the product being sold was life insurance. Second Am. Compl. at ¶ 63. Instead, these presentations labeled what were essentially premium payments as "deposits," "savings," "contributions," or "payments." Second Am. Compl. at ¶ 63.

54. As with the APP plans, Prudential agents often used the investment plan scheme in conjunction with

churning to persuade existing policyholders to replace their policies with "new" ones, misrepresenting the benefits that policyholders could achieve by transferring the accumulated cash values to the "investment plan." Second Am. Compl. at ¶ 63. In particular, agents often misrepresented Prudential's VAL policy as a financial investment. Second Am. Compl. at ¶ 64. Prudential encouraged or permitted these fraudulent sales by providing agents presentations and materials (including mailers, promotional brochures, and videotapes). Second Am. Compl. at ¶¶ 65-66.

55. Prudential knew that agents selling the VAL policies were required to be registered with the National Association of Securities Dealers ("NASD"), and that delivery of a prospectus was required, but nevertheless encouraged VAL sales by agents who were not NASD registered and who did not provide the appropriate prospectus. Second Am. Compl. at ¶¶ 67, 70. Thus, Prudential was aware of the widespread use of the "investment plan" sales tactic and encouraged it. Second Am. Compl. at ¶ 71.

D. Prudential and the Individual Defendants Knew About the Fraudulent Marketing Scheme

56. Not only was Prudential aware of the fraudulent practices from its participation in the scheme, Prudential and the individual defendants were alerted to these practices early in the Class Period by internal investigators. Second Am. Compl. at ¶ 79. In 1982 and 1983, internal investigations by Prudential's regional auditing directors uncovered serious patterns of abuse involving financed

insurance at many Prudential offices. Second Am. Compl. at ¶ 80.

57. When the auditing directors brought the abuse to the attention of Prudential's senior management, management dismissed the auditors' concerns as unimportant. Second Am. Compl. at ¶ 82. At that time, management took remedial action only to achieve "damage control." Second Am. Compl. at ¶ 82. Meanwhile, Prudential used public relations firms to handle the incidents. Second Am. Compl. at ¶ 82. In some cases, Prudential refused to remediate claims even though an office manager confessed to churning and to forging loan applications. Second Am. Compl. at ¶ 82.

58. Prudential also removed auditors who found churning evidence during their auditing projects and told them that "Marketing" would intercede. Second Am. Compl. at ¶ 83. Prudential warned these auditors not to rock the boat. Second Am. Compl. at ¶ 83. Moreover, Prudential demoted, or even terminated, district managers who complained to Prudential regarding the use of deceptive sales practices. Second Am. Compl. at ¶ 83.

59. In 1984, Prudential's auditing department designed a computer system to detect churning. Second Am. Compl. at ¶ 85. When Prudential tested the system in its Minneapolis office, sales plummeted. Second Am. Compl. at ¶ 85. In 1986, Prudential expanded the monitoring and detection system. Second Am. Compl. at ¶ 85. Thereafter, Prudential's senior management became aware that Prudential's Marketing group did not deter abusive sales practices and that Prudential needed a single uniform detection system. Second Am. Compl. at

¶ 85. Prudential, however, did not remedy the abuse or implement a more comprehensive system, but instead transferred the individuals reporting deficiencies from their auditing positions. Second Am. Compl. at ¶ 85. Prudential continued to refer abusive sales practice matters to Marketing, which took no steps to stop the fraud. Instead, Marketing avoided pursuing compliance issues, especially where top sales agents were involved. Second Am. Compl. at ¶ 86.

60. Throughout the Class Period, Prudential affirmatively concealed its material omissions and misrepresentations from policyholders. Second Am. Compl. at ¶ 89. Prudential agents failed to provide policyholders sample policies at the point of sale. Second Am. Compl. at ¶ 90. Indeed, Prudential instructed its agents not to leave policy illustrations with prospective policyholders. Second Am. Compl. at ¶ 90. Even when policyholders finally received the policies, the policies neither corrected any of the oral misrepresentations or omissions, nor disclosed any of the unrealistic assumptions behind the policy illustrations. Second Am. Compl. at ¶ 90. Moreover, agents lied to policyholders and forged premium loans to conceal their wrongful conduct. Second Am. Compl. at ¶¶ 91-92.

61. Prudential also concealed its wrongdoing through its widespread, deliberate strategy to destroy documentary evidence. Second Am. Compl. at ¶ 95. In the summer of 1994, Prudential directed its offices to destroy all sales literature, product brochures, and canvassing letters, except for "approved" materials. Second Am. Compl. at ¶ 96. These documents included both

regional and national documents. Second Am. Compl. at ¶ 97.

E. Plaintiffs Allege Federal and State Causes of Action to Challenge Prudential's Deceptive Sales Practices

62. Plaintiffs assert claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (for the sale of VAL policies), common law fraud, breach of contract, breach of the duty of good faith and fair dealing, negligent misrepresentation, negligence, negligent training and supervision, and unjust enrichment. Second Am. Compl. at ¶¶ 181-237.

III. Background

A. Plaintiffs Sued Prudential Throughout the Country Concerning Prudential's Deceptive Sales Practices and the Judicial Panel on Multi-District Litigation Consolidated the Actions and Transferred them to this Court

63. In February of 1995, various plaintiffs filed lawsuits in federal and state courts against Prudential concerning Prudential's sales and marketing practices. Weiss Aff. at ¶ 23. The original class actions filed against Prudential included *Nicholson v. The Prudential Insurance Co. of America*, filed on February 6, 1995 in the Circuit Court of the Third Judicial Court in Madison County, Illinois, and removed on March 7, 1995 to the Southern District of Illinois; *Kuchas v. The Prudential Insurance Co. of America*, filed on February 28, 1995 in the District of Connecticut;

Zoller v. The Prudential Insurance Co. of America, filed on March 2, 1995 in the District of New Jersey; *Groth v. The Prudential Insurance Co. of America*, filed on March 3, 1995 in the District of New Jersey; *Dorfner v. The Prudential Insurance Co. of America*, filed on March 3, 1995 in the District of New Jersey; and *Toni Wachtler, Larry Wachtler and Norman Gassman v. The Prudential Insurance Co. of America*, filed on May 25, 1995 in the District of New Jersey. *Id.* at ¶ 23 n. 4.

64. In addition to these class actions, dozens of policyholders across the country brought individual actions alleging similar misconduct by Prudential (the "individual actions") and many former Prudential agents sued Prudential, alleging that Prudential wrongfully terminated them for refusing to participate in the deceptive sales practices alleged by the policyholders (the "agent actions"). *Id.* at ¶ 24.

65. On March 31, 1995, plaintiffs in the *Zoller, Dorfner* and *Groth* actions moved to consolidate those actions for pretrial purposes in this Court. *Id.* at ¶ 23. This Court granted that motion on April 25, 1995. *Id.*

66. On April 26, 1995, Prudential motioned to the Judicial Panel on Multi-District Litigation (the "MDL Panel") to consolidate all litigation arising out of Prudential's allegedly deceptive sales practices and to transfer these cases to this Court for coordinated pretrial proceedings. *Id.* at ¶ 24. Prudential then filed motions in the *Kuchas* Action, the *Nicholson* Action and others seeking a stay, or an extension of time to respond to the complaints and to plaintiffs' motions for class certification and intervention pending the multi-district consolidation. *Id.*

67. On August 3, 1995, the MDL Panel granted Prudential's motion for consolidation. August 3, 1995 Transfer Order (the "MDL Transfer Order") (finding that "these twelve actions involve common questions of fact, and that centralization under Section 1407 in the District of New Jersey will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation"). The actions that the MDL initially transferred included the Kuchas and Nicholson actions. *Id.* Since then, the MDL Panel has transferred many other class actions, individual actions, and agent actions to this Court.[13]

68. After the MDL Transfer Order, Prudential removed plaintiffs' state court cases to federal court based on diversity of citizenship or supplemental jurisdiction, and requested that the MDL Panel transfer these cases to this Court as part of the MDL Proceedings.

69. Among the actions that the MDL panel so transferred were: *Krell v. The Prudential Insurance Co. of America*, Case No. 95-CV-282, a purported state-wide class action brought in the Court of Common Pleas, Erie County, Ohio, and removed to the Northern District of Ohio (transferred on November 27, 1995), and *Kittle v. The Prudential Insurance Co. of America*, Case No. 95-C-264, a purported state-wide class action brought in the Circuit Court of Monogalia County, West Virginia, and removed to the Northern District of West Virginia (transferred on August 22, 1995). Counsel for these actions, Michael P.

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[13] More than 100 other actions, including the class actions, the individual actions, and the agent actions, have been filed and centralized in this Court by the MDL Panel.

Malakoff, has bombarded this Court with paper throughout these proceedings.[14]

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[14] In the last six months, Michael Malakoff has filed reams of motions including, among others:

- A motion to enforce Federal Rule of Civil Procedure 5 and Pre-Trial Order Number 1 and to withdraw consent to ex parte communications by the parties with the Court, filed September 30, 1996;
- A motion for exception from Pre-Trial Order Number 1 to obtain discovery directly from Prudential, filed October 28, 1996;
- A motion for recusal, filed December 3, 1996;
- An *emergency motion* for recusal of the District Court Judge, filed December 5, 1996;
- An *emergency motion* to amend the December 5, 1996 Order to Show Cause, filed December 10, 1996;
- An *emergency motion* to allow discovery regarding Lead Counsel's and Prudential's $90,000,000 attorney fee agreement, filed December 12, 1996;
- An *emergency motion* to allow limited discovery regarding plaintiffs' request for attorneys' fees, filed December 12, 1996;
- An *emergency motion* pursuant to Rule 60(b) requesting: (1) relief from the Court's November 22, 1996 Order; (2) an exception from Pre-Trial Order Number 1; and (3) expedited discovery, filed December 12, 1996;
- An *emergency motion* to disqualify Reid Ashinoff, counsel for Prudential and Melvyn I. Weiss, Co-Lead Counsel for Plaintiffs, filed December 12, 1996;
- An *emergency motion* for extension of time to file objections to the Proposed Settlement, filed December 13, 1996;

70. Kittle and Krell both moved to remand. Kittle moved to remand to the state court in West Virginia from

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- An *emergency motion* to file papers via facsimile on December 17, 1996 in support of sanctions against Prudential for destruction of documents, filed December 17, 1996;
- An *emergency motion* to extend the time in which to file objections to (or opt out of) the Proposed Settlement, filed December 17, 1996;
- An *emergency motion* to refer Prudential's destruction of documents to the U.S. Department of Justice, filed December 18, 1996;
- A motion for leave to file an overlength brief in support of objections to Proposed Settlement, filed December 19, 1996;
- An *emergency motion* to strike lead counsel's application for an award of attorney's fees and reimbursement of expenses, filed January 13, 1997;
- An *emergency motion* to compel Lead Counsel and Prudential to produce certain documents, filed January 13, 1997;
- An *emergency motion* to vacate the Court's November 6, 1996 ex parte order appointing a fee examiner, filed January 14, 1997;
- An *emergency motion* to strike Lead Counsel's fee petition, filed January 15, 1997;
- An *emergency motion* to examine proffered demonstrative evidence, filed February 21, 1997;
- An emergency motion for access to judicial records, filed February 21, 1997;
- A supplemental motion for (1) relief from the Court's 11/22/96 Order, (2) exception from Pre-Trial Order Number 1, and (3) for expedited discovery, filed February 21, 1997;

which the case had been removed. This Court denied that motion on January 18, 1996. On January 30, 1996, Kittle moved to certify the Court's denial of his remand motion for interlocutory review pursuant to 28 U.S.C. § 1292(b). This Court denied that motion on March 15, 1996. Krell moved to remand to the state court in Ohio from which the case had been removed. This Court denied that motion on April 16, 1996. On August 6, 1996, Krell and Kittle filed Petitions for a Writ of Mandamus and a Writ of Prohibition concerning the Kittle and Krell Remand Orders, requesting the Court of Appeals for the Third Circuit to compel this Court to remand their cases to state courts in West Virginia and Ohio, respectively. On September 25, 1996, the Court of Appeals denied these petitions without opinion.

- A second supplemental motion for: (1) relief from the Court's 11/22/96 Order, (2) an exception from Pre-Trial Order Number 1, and (3) expedited discovery, filed February 24, 1997;
- An *emergency motion* to require Prudential to respond to a request for admissions about its interpretation of the Settlement Agreement within seven days, filed February 24, 1997;
- An *emergency motion* pursuant to Local Rule 12(B) to file proposed findings of fact and conclusions of law via facsimile and Federal Express or in the alternative, for authorization to utilize the District Court's "Drop Box" for filing after hours on March 3, 1997, filed March 5, 1997.

Indeed, Mr. Malakoff has also filed to date a total of twenty-three personal affidavits and three affidavits of his paralegal.

B. The New Jersey Insurance Commissioner Led Insurance Regulators Throughout the Country to Form a Task Force

71. On April 25, 1995, in response to the allegations that plaintiffs had raised in various complaints, the New Jersey Insurance Commissioner formed the Multi-State Life Insurance Task Force (the "Task Force") comprised of insurance regulators from thirty states. The Task Force endeavored to examine Prudential's sales practices and to determine whether Prudential engaged in abusive sales tactics or permitted these practices to occur. Task Force Report at 1-2, 25. The Task Force's objectives were:

- To examine allegations of churning, twisting, and misrepresentation in the sale of Prudential life insurance products;
- To determine the extent of possible improprieties in Prudential's sale of financed insurance from 1985 onward;
- To determine if Prudential's management "acted responsibly" with regard to its information regarding sales practices and agent misconduct;
- To develop an appropriate remediation plan to identify and recompense policyholders harmed by past unlawful financed insurance sales;
- To develop an appropriate plan design to minimize future financed insurance sales problems; and
- To impose sanctions if appropriate.

Id. at 1-3, 26-27.

72. During the course of its work, the Task Force reviewed and analyzed voluminous materials produced by Prudential, including computer based transaction information and electronic databases created by Prudential at the Task Force's request. *Id.* at 29. The Task Force interviewed over three hundred Prudential employees. *Id.* at 4. The Task Force also reviewed Prudential market conduct examinations that several individual states had undertaken. *Id.*

C. Connecticut Conducted its Own Investigation and Produced an Independent Report

73. In April of 1995, in addition to the Task Force Investigation, the Attorney General of the State of Connecticut initiated a separate investigation into Prudential's allegedly fraudulent life insurance sales practices, spurred by the announcement of a class action filed in the United States District Court, District of Connecticut.[15] Subsequently, the Connecticut Insurance Commissioner agreed to participate in the Task Force, but the Attorney General continued his own investigation, culminating in the Report of Investigation: Life Insurance Sales Practices of the Prudential Insurance Company of America, dated November 21, 1995 (the "Connecticut Report"). Weiss App., Vol. 2, Ex. B.

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[15] The Kuchas Action was filed on February 28, 1995.

D. Plaintiffs Organized and the Court Approved a Consolidated Team to Prosecute the Prudential Fraudulent Sales Practices Actions

74. On August 28, 1995, following the MDL Transfer Order, Plaintiffs' Counsel conducted an organizational meeting to create a coordinated team to prosecute the cases. Weiss Aff. at ¶ 32. At the meeting, Plaintiffs' Counsel elected an Executive Committee headed by Co-Lead Counsel. *Id.*

75. On October 14, 1995, the Court ordered the plaintiffs in the pending policyholder actions to file one amended consolidated complaint, defining one purported class of Prudential policyholders and setting forth all claims which could be asserted on behalf of that class. *Id.* at 37. Additionally, the Court permitted plaintiffs to submit a list of core documents that they sought from Prudential.

76. On October 24, 1995, in Pretrial Order No. 1, this Court appointed Melvyn I. Weiss of Milberg Weiss Bershad Hynes & Lerach LLP, as Co-Lead Counsel for the plaintiffs and Chair of Plaintiffs' Executive Committee, and Michael B. Hyman of Much Shelist Freed Deneberg Ament Bell & Rubenstein, P.C. as Co-Lead counsel for the plaintiffs. Plaintiffs' Counsel elected an Executive Committee headed by Co-Lead Counsel, and including Perry & Windels; Bono, Goldenberg, Hopkins & Bilbrey, P.C. (now known as Hopkins Goldenberg, P.C.); and Arnzen, Parry & Wentz, P.S.C. The Executive Committee elected Goldstein Till & Lite (now Goldstein Lite & DePalma) as Liaison Counsel. *Id.*

77. Pretrial Order No. 1 designated the Executive Committee, Co-Lead Counsel, and Liaison Counsel (collectively "Class Counsel" or "Plaintiffs' Counsel") to act on behalf of the plaintiffs in the class actions and on behalf of the plaintiffs in a group of related individual actions for discovery purposes. *Id.*

78. Also, on October 24, 1995, plaintiffs filed the Consolidated Amended Class Action Complaint ("First Amended Complaint"). This complaint combined all of the claims made by class plaintiffs then before the Court. *Id.* at ¶ 39. The First Amended Complaint alleged that Prudential had engaged in a fraudulent course of conduct to deceive and induce class members into purchasing Prudential life insurance products. *Id.* at ¶ 40. The complaint asserted violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, common law fraud, breach of contract, bad faith, negligent misrepresentation, negligence, unjust enrichment, and breach of state consumer fraud statutes. *Id.* at ¶ 41. The First Amended Complaint further alleged that Prudential had made material omissions and misrepresentations in sales presentations, policy illustrations, marketing materials, and other information that Prudential approved, prepared, and disseminated to its nationwide sales force. *Id.* at ¶ 8. Finally, the First Amended Complaint alleged that Prudential had wrongfully churned policyholders, sold vanishing premium policies, and disguised life insurance as investment products. *Id.* at ¶¶ 29-43, 45-52, 53-55.

E. Plaintiffs Conducted Both Formal and Informal Discovery to Obtain Information Relating to Prudential's Alleged Fraudulent Sales Practices

79. On October 24, 1995, Plaintiffs' Counsel submitted the core documents list requested by this Court at the October 10, 1995 meeting. Weiss Aff. at ¶ 44. Plaintiffs sought, among other materials, documents that Prudential had provided to the Task Force, organization charts, documents concerning the manner in which Prudential agents and their supervisors were compensated, computer software relating to policy illustrations, Prudential's sales and training materials, customer complaint files, age and discipline files, documents concerning the setting of dividends and interest rates, and documents concerning Prudential's Ethics Hotline. *Id.*

80. At a status conference held on November 9, 1995, Prudential announced it was preparing motions to dismiss or stay the actions on the bases of "primary jurisdiction" and Rule 12(b)(6). November 9, 1995 Tr. at 32-33. At the November 9, 1995 status conference, the Court concluded, over plaintiffs' objection, that before any significant formal activity, including class certification, would occur, the Court would need to resolve the "primary jurisdiction" and Rule 12(b)(6) motions. Weiss Aff. at ¶ 45. The Court required that Prudential make a limited document production, including organization charts, documents relating to the Task Force formation, and all documents that Prudential had previously produced to the Task Force and to regulatory authorities in Connecticut and Florida. *Id.* at ¶ 46. Prudential argued to

the Court at this meeting that New Jersey's Rule of Professional Conduct 4.2 ("RPC 4.2") prohibited Class Counsel from communicating with present or former Prudential employees regarding plaintiffs' claims. *Id.* at ¶ 47.

81. On November 27, 1995, Prudential again argued its interpretation of New Jersey RPC 4.2, this time through a formal motion. *Id.* at ¶ 50. Finding this reasoning unpersuasive, the Court permitted Class Counsel to develop a method to interview current and former Prudential employees. *See In re The Prudential Insurance Co. of America Sales Practices Litig.*, 911 F.Supp. 148 (D.N.J.1995). On January 23, 1996, this Court allowed interviews of current and former Prudential employees to proceed in accord with the Court-approved script and guidelines. Weiss Aff. at ¶ 51.

82. Meanwhile, on December 29, 1995, Co-Lead Counsel moved to stay the *Krell* and *Kittle* actions, arguing that the conduct of counsel for *Krell* and *Kittle* was obstructing Class Counsel's efforts to prosecute the consolidated class actions. *Id.* at ¶ 55. On March 14, 1996, this Court denied the motion without prejudice. *Id.*

F. Plaintiffs Rebuffed Prudential's Early Settlement Overtures While Discovery and Motion Practice Continued

83. At this time, Prudential first raised the issue of settlement with plaintiffs' counsel. The settlement discussions abruptly ended, however, because plaintiffs would not discuss settlement absent significant discovery. Weiss Aff. at ¶ 49. Accordingly, Fee Examiner Stephen M.

Greenberg praised Plaintiffs' Counsel for elevating the class interest over Class Counsel's economic interest: "Plaintiffs' counsel acted in this regard with singular devotion to the interests of the class, putting aside their own economic interest in a potential early settlement without the expenditure of substantial assets." Report and Recommendation of Stephen M. Greenberg, Fee Examiner dated February 13, 1997 at 16 ("Fee Report").

84. From the outset, Class Counsel would not conduct settlement negotiations without certain ground rules: (i) plaintiffs would not discuss settlement terms before Class Counsel had a basis to evaluate Prudential's conduct; (ii) the financial and Alternative Dispute Resolution ("ADR") settlement terms would depend on Class Counsel's conclusions about the egregiousness and degree of Prudential management's participation in the wrongful practices; and (iii) plaintiffs would likely insist on funds in excess of compensatory payments based on Class Counsel's preliminary investigation. Weiss Aff. at ¶ 46. Because Prudential rejected Class Counsel's ground rules, negotiations quickly ended.

85. On December 26, 1995, the defendants moved to dismiss the First Amended Complaint under Federal Rules of Civil Procedure 12(b)(6) and 9(b). In support of their motion, defendants claimed: (1) the securities law claims statute of limitations had run and that the claims lacked various elements; (2) the New Jersey Consumer Fraud Act claims were preempted by New Jersey's comprehensive regulation of the insurance industry; (3) the common law fraud allegations lacked particularity under Rule 9(b), failed to include allegations of requisite scienter, and improperly alleged plaintiffs' reliance based on

Prudential agents' oral statements, which were contradicted by written Prudential documentation; (4) the negligent misrepresentation claim failed to include requisite allegations that specific Prudential agents knew or should have known of the falsity of the alleged misrepresentations; (5) the contract claims were barred by the plain language of the integrated written contracts; (6) no duty existed for the claim for breach of the fiduciary duty; and (7) the negligent supervision claims were not supported by the factual allegations. *See generally* Memorandum of Law in Support of Defendant's Motion to Dismiss the Consolidated Amended Class Action Complaint. Plaintiffs responded both to the primary jurisdiction and Rule 12(b)(6) motions with vast briefs and an array of supporting documents.

86. In early 1996, settlement negotiations renewed, because Prudential agreed to provide discovery. Weiss Aff. at ¶ 57. By March 12, 1996, however, the negotiations broke down, because Class Counsel would not accept the conditions that Prudential sought to impose on plaintiffs' receipt of the discovery. *Id.* Prudential demanded that plaintiffs agree to use the produced discovery for settlement purposes only and that the discovery not be used to respond to the motions to stay or dismiss, to prepare the motions for class certification, or to amend the Complaint. *Id.* When the settlement negotiations faltered, Prudential immediately ceased producing documents. March 12, 1996 Letter from Melvyn Weiss to Reid Ashinoff (discussing the breakdown of negotiations), *in* Weiss App., Vol. 1, Ex. K. On March 13, 1996, the parties informed the Court that they were at loggerheads.

G. Motion Practice Continued and Plaintiffs Pursued Informal Discovery

87. On April 7, 1996, the Court made several key determinations. The Court denied Prudential's motion to stay or dismiss the class action based on primary jurisdiction and the Burford Abstention doctrine, the Court decided to postpone the class certification issue until the conclusion of the Task Force investigation, and the Court permitted limited discovery with prior Court approval.

88. While formal discovery was restricted, the Court permitted Class Counsel to interview, under RPC 4.2, former Prudential employees. *See In re The Prudential Ins. Co. of America Sales Practices Litig.*, 911 F.Supp. 148 (D.N.J.1995). Thereafter, Plaintiffs' Counsel contacted hundreds of current and former Prudential agents from lists obtained from Prudential and from other sources. Weiss Aff. at ¶ 61. Through the interviews, Plaintiffs' Counsel obtained critical information concerning fraudulent sales practices and document destruction; Plaintiffs' Counsel also acquired hundreds of Prudential documents, and video and audio tapes. *Id.* at ¶ 64.

89. Plaintiffs' Counsel also contacted thousands of class members through interviews and questionnaires. Counsel's findings tend to support plaintiffs' claim that Prudential had engaged in a uniform scheme to defraud policyholders. *Id.* at ¶ 72.

H. The Court Dismissed Many of the Claims in Plaintiffs' First Amended Complaint

90. On May 10, 1996, this Court concluded that while plaintiffs had alleged Prudential's scheme to defraud with adequate particularity, many of the individual plaintiffs' claims should be dismissed without prejudice. *See generally* Order and Opinion dated May 10, 1996, 1996 WL 392145, as amended on June 10, 1996. The Court dismissed three of the five named plaintiffs' claims without prejudice. The Court also dismissed plaintiffs' claims for breach of contract, breach of fiduciary duty, and violation of the New Jersey Consumer Fraud Act. The claims against the individual defendants Arthur F. Ryan, Donald D. Barbaro, and Ronald G. Southwell were voluntarily dismissed without prejudice.

91. The Court found that plaintiffs would not likely prevail on many of their claims, even if they survived Prudential's initial challenges to their pleadings:

> The Court has found much of the Complaint to be deficient, and will dismiss several of plaintiff's claims without prejudice. On the other hand, the standard for dismissal under Rule 12(b)(6) is a high one, and the Court has allowed several claims to go forward, despite considerable doubt as to their ultimate merits. In sum, this opinion will likely not be the final word in framing the issues ultimately to be resolved in this case. Plaintiffs may successfully replead some of their claims, and Prudential may prevail on some of its arguments at the summary judgment stage.

Id.

I. The Task Force Found that Prudential Had Committed Widespread Sales Practice Abuse, Fined Prudential $35 Million, and Released the Task Force Plan[16]

92. During the course of its proceedings, the Task Force reviewed numerous Prudential documents and electronic data bases and interviewed many Prudential agents and executives. Stipulation of Settlement at ¶ 6. Prudential and the Task Force continued to negotiate a remediation plan to provide relief to policyholders who

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[16] The Connecticut Attorney General, on November 21, 1995, issued his own investigative report. The Connecticut Report found, among other things, that Prudential's churning activities within Connecticut were widespread and uniformly misleading:

> The core finding of this investigation is that there is evidence that Prudential agents induced policyholders in Connecticut to apply the cash value and dividends of existing life insurance polices [sic] to purchase additional life insurance by falsely representing that policyholders would have no out-of-pocket expenses for the new policy when they knew or should have known that these representations were false. There is also ample evidence that Prudential agents failed to disclose or misrepresented the transaction and the effect on the values of existing policies to the detriment of policyholders in Connecticut.
>
> * * *
>
> There is evidence that Prudential knew, or should have known, in the reasonable conduct of its business of the unfair or deceptive acts or practices of its agents in the state of Connecticut, and that it may be found to be responsible for such unfair or deceptive acts or practices.

Connecticut Report at 67.

had been harmed by Prudential's misrepresentations. *Id.* at ¶ 8. In July of 1996, in anticipation of the Task Force's release of the Task Force Report and Task Force Plan, the Court requested a "quiet period" during which the parties would review and study these documents but make no public comment. Weiss Aff. at ¶ 75.

93. On July 9, 1996, the Task Force issued its report. The Task Force found that many Prudential policyholders had been misled to purchase life insurance and that Prudential's internal efforts to prevent these abuses were inadequate. Task Force Report at 13-17. The Task Force Report found, for example:

- "serious communication problems between Prudential and its sales force," *Id.* at 8;
- "widespread violations by Prudential agents" of state replacement regulations, and that "some Prudential agents engaged in abusive sales practices" and "[i]n some cases, agents caused additional premiums to be paid," *Id.* at 14; and
- "Prudential failed to responsibly police and discipline its agents with regard to replacement activities," *Id.* at 15.

The Task Force Report also noted that "[i]n many instances, if the policyholder questioned the agent about why loans were being taken against the contract, he/she was told it was a Home Office mistake and were [sic] advised by the agent that he or she would take care of the problem." *Id.* at 189.

94. The Task Force also found, however, that not all replacement transactions or APP transactions were improper:

> It is important to note that not all policyholders were dissatisfied and not all sales by Prudential agents were improper. Between 1990 and 1994, only 2.6 policyholders per 1,000 in-force policies filed sales complaints with the company or regulators. Replacements, financed insurance and APPs represented 14 percent, 16 percent and 14 percent of new sales, respectively, at their peak in 1990. There was a steady decline in all three types of sales between 1990 and 1994.

Id. at 11.

95. Additionally, the Task Force Report included a remediation plan, the Task Force Plan. The Task Force Plan provided policyholders the opportunity to participate in either an ADR process or Basic Claim Relief. *Id.* at 18. This plan essentially tracked a settlement that many of the counsel representing plaintiffs in this action had developed in litigation with New York Life Insurance Company. *Id.* at 31-33, 192-93. Forty-three states and the District of Columbia signed Consent Decrees adopting the Report, the Task Force Plan, and the associated fines.

J. The MDL Panel Continued to Transfer Actions to this Court and Some Individual Plaintiffs Filed a Consolidated Motion to Remand

96. Prior to July 23, 1996, the MDL Panel transferred approximately thirty additional policyholder actions, mostly individual actions, to this Court. The Court invited counsel for these actions to a conference on July

23, 1996. Only one representative attended. At the July 23, 1996 conference, the Court indicated that Lead and Liaison Counsel for the class action cases should also serve that function in the individual cases.

97. In October of 1996, many of these individual plaintiffs filed a Consolidated Motion for Remand. Under this Court's November 12, 1996 Order, the Consolidated Motion for Remand was to be heard on March 21, 1997. The motion since has been adjourned and will be heard in April.

K. While Class Counsel Continued to Pursue Discovery and to Amend the Complaint, Prudential Counsel and Class Counsel Resumed Settlement Negotiations, Which Resulted in the Settlement Agreement and Later in the Stipulation of Settlement

98. The release of the Task Force Report enlivened settlement negotiations. At this time, Prudential agreed to negotiate in accordance with plaintiffs' rules, the rules that Prudential had rejected in late 1995 and early 1996. Weiss Aff. at ¶ 84; Ashinoff Aff. at ¶ 5. Moreover, Prudential finally agreed to produce additional documents and witnesses for deposition. Weiss Aff. at ¶ 84; Ashinoff Aff. at ¶¶ 8, 11-14.

99. Lead counsel indicates that the settlement negotiations proceeded in three stages: "The more fruitful settlement negotiations . . . can be divided into three phases: first, the period from July 6 through August 16, 1996 (the 'Preliminary Negotiations'); second, the period

from August 17, through September 22, 1996 (the 'Settlement Agreement Negotiations'); and third, the period from September 23 through October 28, 1996 (the 'Stipulation of Settlement Negotiations')." Weiss Aff. at ¶ 103.

100. Following the release of the Task Force Report and Plan on July 9, 1996, the preliminary negotiations began. *Id.* at ¶ 104. On July 16, 1996, at the Court's direction, and after plaintiffs had studied the Task Force Report and Plan, the parties began conducting extensive discussions.

101. On July 18, 1996, plaintiffs prepared and served document requests on Prudential in an effort to ensure that plaintiffs had not missed any material information in their earlier efforts. *Id.* at ¶ 48. By August 8, 1996, plaintiffs had received more than seventy boxes of documents in response to the July 18, 1996 request. *Id.*

102. Plaintiffs' repeated insistence on a rebuttable presumption that all replacements had been made through misrepresentations, entitling each policyholder claiming wrongful replacement to an automatic ADR score, was a major impediment to negotiations. *Id.* at ¶ 107. Prudential would not concede this point, arguing that it had also refused to concede this point to the Task Force. *Id.*

103. On August 12, 1996, the Court met separately with Prudential and Class Counsel. *Id.* at ¶ 108. In the next couple of days, August 15 and 16, 1996, Class Counsel and Prudential counsel met to overcome the hurdles. *Id.* As an alternative to the blanket rebuttable presumption that had previously stymied negotiations, Class

Counsel developed the concept of the financial guarantees. *Id.* at ¶ 109. These guarantees were a creative approach to achieving an eventual settlement.

104. August 16, 1996 marked the beginning of the second phase of settlement negotiations, the "Settlement Agreement Negotiations." *Id.* at ¶ 117. During this phase, the parties negotiated the many detailed ADR and Basic Claim Relief improvements. *Id.*

105. On September 20 and 21, 1996, the parties informed the Court of the few remaining unsettled issues. *Id.* at ¶ 124. These open issues included: the appropriate cut-off date for the Complaint History factor, whether and when Prudential would be permitted to terminate the settlement based upon the number of class members requesting exclusion, whether the deadline for filing an election form should be increased from sixty to seventy-five days, the role of Plaintiffs' Counsel and the Court in fashioning an outreach program, and the allocation of the Additional Remediation Amount among remediated claimants. *Id.*

106. On September 22, 1996, after reviewing drafts of a joint press release, the parties executed the Settlement Agreement, which memorialized all of the terms of the parties' settlement. *Id.* at 128; Settlement Agreement in Weiss App., Vol. 2, Ex. M ("Settlement Agreement"). For the Settlement Agreement to become fully effective, however, three important conditions had to occur. First, the Settlement Agreement was not to apply to any policyholder living in one of the forty-three states and the District of Columbia that had adopted the Task Force Report and Plan through the entry of the Consent Order

unless the policyholder's jurisdiction agreed to modify its Consent Order to conform to the Settlement Agreement. Settlement Agreement at ¶ F.7. Second, the Settlement Agreement required the parties to execute a final Stipulation of Settlement by October 28, 1996. *Id.* at ¶ F.3. Third, the Stipulation of Settlement would differ from the Settlement Agreement if the ongoing discovery revealed facts that were materially inconsistent with the information that Prudential had provided to plaintiffs before signing the Settlement Agreement. *Id.* at ¶ F.2.

107. Importantly, the parties did not discuss attorneys' fees on or prior to September 22, 1996. *Id.* at ¶ K.

108. During this general time frame, plaintiffs continued their discovery efforts. Weiss Aff. at ¶ 83. In mid-August 1996, Prudential agreed to produce documents relating to three broad categories: actuarial documents, complaint documents (including policyholder complaints to Prudential and Prudential agent complaint files), and other documents such as training documents, marketing documents, internal publications, and internal communications. *Id.*

109. On September 19, 1996, plaintiffs compiled the evidence that they had accumulated through their investigations and through formal and informal discovery and filed the 237 paragraph Second Amended Complaint. The Second Amended Complaint contained legal claims similar to those asserted in the First Amended Complaint (common law fraud, breach of contract, breach of duty of good faith and fair dealing, negligent misrepresentation, negligent training and supervision, unjust enrichment,

and imposition of a constructive trust), but significantly expanded plaintiffs' factual allegations.

110. Plaintiffs served Prudential with a formal discovery demand on September 30, 1996. Weiss App., Vol. 1, Ex. H. Prudential served its formal response to this demand on October 25, 1996. *Id.*, Vol. 1, Ex. I. In total, Prudential produced over one million pages of documents, 160 computer diskettes and cartridges, and over 500 audio and video tapes. Weiss Aff. at ¶ 85.

111. Class Counsel assembled a team of approximately thirty attorneys, with consulting actuaries and paralegals and data processing staff, to analyze and categorize these documents. *Id.* at ¶ 86; Ashinoff Aff. at ¶ 12. The team reviewed all of the produced information and conducted twenty depositions. Weiss Aff. at ¶ 91.

112. Between September 23 and October 28, 1996, the parties conducted the final phase of settlement negotiations, the "Stipulation of Settlement" negotiations. *Id.* at ¶ 130. These negotiations focused on:

- Creating a Mutual Fund Enhancement as an additional element to the Basic Claim Relief Package and other enhancements to the already expanded Basic Claim Relief package;

- Completing final discovery to ensure the validity of the assumptions underlying the settlement;

- Preparing the Stipulation of Settlement, sample claim forms, Class Notice, and other documents; and

- Harmonizing the Stipulation of Settlement with comments received from state regulators that had adopted the Task Force Plan.

Id. Plaintiffs anticipated that the forty-four jurisdictions with Consent Orders would agree to amend their Consent Orders to conform to the terms of the Settlement Agreement. *Id.*

113. The Task Force Plan, and the concomitant Consent Orders, provided generally that the Task Force Plan was to be implemented in October of 1996. *Id.* at ¶ 131. The regulators' principal concern was to remediate claims quickly. The Settlement Agreement had contemplated implementation only if and when the Settlement were approved and all appeals, if any, were concluded. *Id.*

114. Plaintiffs' Counsel, Prudential, and the regulators agreed that the ADR process and Basic Claim relief package would be implemented by February 1, 1997, with certain exceptions.[17] *Id.*; Ashinoff Aff. at ¶ 15.

115. Class Counsel ultimately succeeded in obtaining many terms which Prudential had previously rejected:

> [P]laintiffs' counsel insisted on, and obtained, an ADR Process that included a claimant representative, chosen by Lead Counsel, to monitor the ADR Process; a commitment by Prudential to make a minimum expenditure of at least $410 million for ADR remedies; a commitment by Prudential to make a payment of additional

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[17] The financial minimums and guarantees, and the Mutual Fund Enhancement, for example, would only be implemented after all settlement appeals were resolved.

> remediation amounts, above and beyond compensatory relief, to be distributed amongst eligible Class Members; and other financial guarantees, all points to which Prudential objected when the negotiations started.

Ashinoff Aff. at ¶ 9.

116. On October 11, 1996, after all outstanding material provisions of the Stipulation of Settlement had been resolved, the Court granted the parties oral permission to negotiate attorneys' fees. The parties thereafter agreed on attorneys' fees and incorporated an appropriate provision in the Stipulation of Settlement ¶ K. Weiss Aff. at ¶ 132; Ashinoff Aff. at ¶ 16. The parties executed the Stipulation of Settlement on October 28, 1996. Weiss Aff. at ¶ 184.

L. The Court Ordered Conditional Certification of the Class and that the Parties Mail Class Members Notice of the Proposed Settlement

117. On October 28, 1996, the Court (1) approved the Form of Class Notice for dissemination to policyholders to advise them of the Proposed Settlement, and (2) set a date for a hearing on the fairness, reasonableness and adequacy of the Proposed Settlement; certification of the Settlement class, and plaintiffs' request for fees and reimbursement of expenses.

118. On October 28, 1996, the Court issued an Order that:

- conditionally certified the Class for settlement purposes,

- designated the law firms Milberg Weiss Bershad Hynes & Lerach LLP and Much Shelist Freed Denenberg Ament Bell & Rubenstein, P.C as Lead Counsel for the Class,
- designated additional counsel for the Class,
- designated the named plaintiffs in the Second Amended Complaint as Class Representatives,
- scheduled the Fairness Hearing for January 21, 1997,
- directed the form and timing of Class Notice, which provided an opportunity for class members to opt out or object, and
- imposed a preliminary injunction to effectuate the Proposed Settlement, enjoining policyholders or others acting on their behalf from excluding any other policyholders from the Class, from filing, commencing, continuing, litigating, intervening in or participating in any lawsuit in any jurisdiction based on facts and circumstances of the claims asserted here, unless that policyholder has opted out of the Class.

IV. Stipulation of Settlement Terms

119. Under the Proposed Settlement, each class member may choose between an ADR process or Basic Claim Relief.

A. The Proposed Settlement Provides an Alternative Dispute Resolution Process Through Which Policyholders May Obtain Full Remediation

120. Class members can elect to submit their claims to the ADR process, which is a fair and swift alternative to litigation. The ADR process allows a class member to attain claim resolution, more quickly and easily than would be possible through litigation. The ADR process also is less expensive than litigation, because there are no costs to the class member; Prudential has agreed to pay all costs. Class members need not retain counsel to participate in the ADR, although class members may retain counsel if they so choose.

121. The Prudential Alternative Dispute Resolution Guidelines (the "ADR Guidelines") provide detailed mechanisms to elicit complaints from policyholders, to gather relevant evidence from the claimant and Prudential's files and agents, to evaluate class member claims, to score claims properly based on the evidence gathered and the appropriate standards, to ensure adequate representation, and to offer appropriate relief based upon the claimant's score. Stipulation of Settlement, Ex. B.

1. The ADR Procedures Cast a Wide Net to Gather Evidence Relevant to Class Members' Claims

122. Before claims are scored, the claimants must complete a Claim Form questionnaire. The policyholder must sign the form under penalty of perjury, but the form

need not be notarized. The claimant must attach all pertinent records to the Claim Form.

123. An "800" telephone number will provide claimants with assistance in completing their forms; Plaintiffs' Counsel will monitor the operators at the number to ensure that all advice given is accurate and adequate. If the claimant does not properly complete the form, Prudential will return the form and allow the claimant to correct the deficiency within thirty days.

124. Once the Claim Form has been properly submitted, Prudential must obtain its own internal records regarding the transaction and must contact the agent who sold the claimant the policy. Prudential may not discipline an agent solely based upon truthful representations that the agent made in a statement filed in response to a claim. Stipulation of Settlement, Ex. C, at 7, ¶ II.G.2.c.

2. The ADR Process Contains Specific Claim Evaluation Procedures to Ensure that All Relevant Evidence Is Considered

125. The claim evaluation process involves comprehensive multi-tier reviews.

126. First, a claim is reviewed by a member of the Claim Evaluation Staff. This Staff is comprised of Prudential personnel not involved with the sale of individual insurance policies. A "Claimant Representative" appointed by Class Counsel and compensated by Prudential will monitor this Staff. The Claimant Representative or his assistants will continue to aid each claimant throughout the ADR process.

127. Second, if the Claim Evaluation Staff does not award the highest score available, a "3," an Independent Claim Evaluation Team (the "Claim Team") will automatically review the claim. The Claim Team members are not affiliated with Prudential. All members are appointed by Class Counsel and the Regulatory Oversight Staff.[18] Prudential pays the costs of Claim Team review. The Claim Team uses the same scoring criteria used by the Claim Evaluation Staff. If the Claim Team disagrees with the Claim Evaluation Staff's findings, the Claim Team will recommend in writing that the Claim Evaluation Staff increase the claimant's score.

128. Third, a member of the Claim Review Staff will review the Claim Team recommendation. The Claim Review Staff consists of Prudential employees who have not acted as licensed agents for the company and have not supported or supervised licensed agents. The final determination of the Claim Review Staff is monitored by the Claimant Representative. Prudential may not appeal this decision.

129. Fourth, if the claimant is dissatisfied with the Claim Review Staff determination, the claimant may obtain arbitration of the decision by the Appeals Committee. This Committee is comprised of individuals not affiliated with Prudential. These individuals are experienced in life insurance or in arbitration. Appeals Committee

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[18] The regulatory oversight staff includes those persons appointed or designated by the State Insurance Departments assembled to provide oversight of the Programs. Stipulation of Settlement, Ex. C, at 3, ¶ I.D.10.

members are selected by Class Counsel and by the Regulatory Oversight Staff, from a list jointly agreed upon by Class Counsel, the Regulatory Oversight Staff, and Prudential.

130. The Appeals Committee uses the same criteria used by the Claim Evaluation Staff and Claim Team, but the Committee reviews a claimant's score *de novo*. At this stage, the claimant may obtain cost-free representation by a Representative who has been appointed by Class Counsel and approved by the Task Force. The claimant has a right to rehearing if the Claimant Representative determines that a "manifest injustice" has occurred in connection with the claim.

131. Class Counsel and the Regulatory Oversight Staff will act to ensure the fairness of the entire process. Moreover, Prudential will select, at its own expense, an independent public accounting firm, satisfactory to Lead Counsel and the Regulatory Oversight Staff, to serve as independent auditors and assess the consistent application of the ADR guidelines and procedures. Stipulation of Settlement, Ex. C, at 17-18, ¶ IV.D.

3. The ADR Process Provides that Claims Are Scored Generously According to the Class Members' Claim and the Available Evidence

132. Under the Proposed Settlement, claims are scored depending on the type of claim. Three claim categories correspond to the deceptive sales categories described in the Second Amended Complaint: "Financed Insurance," "Abbreviated Payment Plan," and "Life

Insurance Sold as an Investment, Savings or Retirement Vehicle." *Id.*, Ex. B, at 16, 26, 34, ¶¶ II, III, IV. The Proposed Settlement also includes a fourth, miscellaneous category, "Other," for claims of misconduct, in the sale or servicing of a policy, that are not covered by the other categories. *Id.*, Ex. B, at 307, ¶ V.

133. Within each of the categories, the ADR Guidelines provide "Claims Resolution Factors" that scorers must use to assess the merits of a claim. For example, in a case involving Financed Insurance, or churning, Claim Resolution factors include: "A Misstatement in respect of loans [that] was made to the Policyholder as to whether, or to what extent, loans would be taken or charged against the Existing Policy to finance the New Policy." *Id.*, Ex. B, at 16, ¶ II.A.1.

134. To determine whether the claimant has demonstrated a Claims Resolution Factor, the scorer looks to a list of "Specific Evidentiary Considerations." In each of the four claims categories, the Guidelines provide Specific Evidentiary Considerations that are considered "supporting evidence" and "undermining evidence." The Specific Evidentiary Considerations provide the decision calculus that the scorers will use to determine a policyholder's score.

135. In cases involving Financed Insurance, for example, a policyholder's score may be increased if: (1) "the Policyholder was advised by the Agent, after the issuance of the New Policy, to disregard notices of the Company concerning loans," (2) if the agent engaged in a pattern of such transactions, or (3) if the policyholder had

an annual income of less than $25,000. *Id.*, Ex. B, at 17, ¶ II.B.1.

136. In Abbreviated Payment Plan or Vanishing Premium claims, a policyholder's score could increase if a Prudential agent told the policyholder to disregard notices concerning loans or lapses, or if Prudential used the phrase "vanishing premium" or "vanish point" in writing. *Id.*, Ex. B, at 26, ¶ III.B.1.

137. In addition to the specific evidentiary considerations applicable to specific claims, there are other considerations that apply to all claims. For example, under the Proposed Settlement, a claimant's score can be increased if there is evidence that documents pertinent to the claim have been lost or destroyed. Similarly, a claimant's score can be increased if there is a record of disciplinary action against the agent who sold the policy, or if the agent does not cooperate with Prudential in responding to the claim. *Id.*, Ex. B, at 11, ¶ I.F.1.c-d.

138. Scorers give claims a score of "1, 12," or "3," with "3" being the highest score.[19] The highest score the

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[19] By assessing the claim resolution factors according to the available evidence, scorers will award each claimant a score. The scores are as follows:

> "3" A score of "3" is assigned in the event that either (i) Company Documentation expressly supports the Misstatement, *or* (ii) the Agent Statement confirms the Claimant's allegation of the Misstatement and this confirmation is not undermined by Available Evidence.
>
> "2" A score of "2" is assigned in the event that the alleged Misstatement is not expressly in writing and

policyholder receives in any claim category determines the relief that the policyholder will be entitled to.

139. The relief available through the ADR Process varies depending on the type of claim and the level of proof supporting it. Stipulation of Settlement at 17, ¶ C.1. The various types of relief are designed to provide comprehensive compensation that addresses the type of claim and the harm associated with it. Under this system, scores of "3" will receive full compensatory relief.

140. The relief available depends not only on whether the claimant receives a score of "1," "2," or "3," but also on the type of claim that the claimant has asserted. The following paragraphs explain the types of relief available to different types of claims:

> the Agent Statement denies the allegations, but (i) Available Evidence, on balance, supports the Claimant's allegation of the Misstatement, *or* (ii) the Agent has a Complaint History.
>
> "1" A score of "1" is assigned in the event that the alleged Misstatement is not expressly in writing and the Agent Statement denies the allegation, and Available Evidence, on balance, neither supports nor undermines the Claimant's allegation of the Misstatement.
>
> "0" A score of "0" is assigned in the event that Available Evidence exists which undermines the Claimant's allegation of the Misstatement and suggests that no Misstatement occurred.
>
> "NA" "N/A" is assigned in the event that the Claim Resolution Factor is "not applicable" to the Claim submitted.

Stipulation of Settlement, Ex. B, at 9, ¶ I.D.

- **Financed Insurance** – The policyholder may obtain a refund of the loans, dividends, or values improperly used, with interest in some cases. The policyholder also may be entitled to cancel the "new" policy and get back some or all of the premiums paid, with interest in some cases. February 1, 1997 Notice at 7.

- **Abbreviated Payment** – The policyholder may be permitted to cancel the policy and obtain a refund of some or all of the premiums paid, with interest in some cases. Alternatively, the policyholder may be permitted to keep the policy without having to make any additional out-of-pocket payments for some or all of the premiums due. *Id.* at 7-8.

- **Investment Product** – The policyholder may be allowed to cancel the policy and obtain a refund of some or all of the premiums paid, with interest in some cases. Alternatively, the policyholder may be able to exchange the policy for an annuity. *Id.* at 8.

- **Other Claims** – If a policyholder was misled in some other way, the policyholder may be allowed to cancel the policy and obtain a refund of some or all of the premiums paid, with interest in some cases, or may be able to use the refund to purchase another policy. *Id.*

B. Policyholders Who Do Not Desire to Participate in the ADR Process Receive Real and Valuable Benefits Through Basic Claim Relief

141. Class members who prefer not to participate in the ADR process, may receive the Basic Claim Relief benefits available to all class members.[20] Class members need provide no proof of injury to avail themselves of these benefits.

142. Four types of Basic Claim Relief are available to class members: Optional Premium Loans, Enhanced Value Policies, Enhanced Value Annuities, and Mutual Fund Enhancements. Arthur Andersen, LLP has valued this relief at $799.6 million. Hoyer Aff. at ¶ 6 and Ex. B.

143. Optional Premium Loans are loans that defray the costs of out-of-pocket premiums due that are beyond what was initially illustrated to the policyholder. Stipulation of Settlement, Ex. D, at 3, at ¶ I.B.11. These loans charge policyholders an interest rate equal to Prudential's unsecured short-term cost of borrowing. *Id.*

144. The Enhanced Value Policy is intended for class members who have borrowed heavily against their existing polices [sic] and desire to obtain a new policy in a comparable amount with liberalized underwriting. The Enhanced Value Policy is an insurance policy with features similar to the class member's existing or terminated

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[20] Any claimant may first choose Basic Claim Relief. If the claimant chooses ADR, however, and later receives a score of "0," meaning that the evidence indicates no valid claim, then the claimant cannot receive Basic Claim relief.

policy, except that Prudential will contribute to the policy's cash value 50% of the Enhanced Value Policy's first year premium on the first annual premium due date, 25% on the third annual premium due date, 25% on the fifth annual premium due date, and 15% on the seventh annual premium due date. *Id.*, Ex. D, at 5, ¶ III.A.

145. The Enhanced Value Annuity is a currently issued, designated, nonqualified deferred annuity. *Id.*, Ex. D, at 6, ¶ IV.A. Where the first payment into the annuity is less than $25,000, Prudential will add 2% to the value of the annuity in the first year. *Id.*, Ex. D, at 7, ¶ IV.A.7. Where the initial payment is over $25,000 and not greater than $50,000, Prudential will add 3% to the value of the annuity in the first year. *Id.* In addition, Prudential will contribute 2% of the initial premium in the second policy year and 1% of the initial premium in the third policy year. *Id.*

146. The Mutual Fund Enhancement gives a policyholder a choice between certain mutual funds, where Prudential will contribute 4% of the initial purchase amount to the value of the funds, to a maximum of $2,000. *Id.*, Ex. D, at 8, ¶ V.A.

C. Financial Commitments Guarantee that Class Members Will Receive Substantial Relief Under Any Turn of Events

147. The Proposed Settlement contains three "Financial Commitments" to ensure that policyholders will receive the relief to which they are entitled.

148. First, the Proposed Settlement contains a "Minimum Payment" provision. This provision requires Prudential to spend at least $410 million in the ADR process, regardless of the number of remediated claims.

149. Second, the Proposed Settlement contains a "Financial Guarantee" of $780 million. During settlement negotiations, Prudential provided plaintiffs with various projections of anticipated spending under the Task Force Plan. Prudential indicated that it would likely spend $220 million for each 110,000 claims remediated and that many claims would receive high scores. Plaintiffs insisted that Prudential guarantee to spend these amounts; the plaintiffs eventually negotiated an increase in the guaranteed amount from $220 million to $260 million for each 110,000 (up to 330,000) claims, for a total of $780 million.

150. Third, the Proposed Settlement provides an "Additional Remediation Amount" on a sliding scale. This Amount is a fund in addition to the compensatory relief provided by the ADR process. Under the Proposed Settlement, the Court determines how to allocate the Additional Remediation Amount among claimants who have scored a "3" or a "2," unless the Court finds that the amount should be allocated more broadly. Stipulation of Settlement, Ex. B, at 39, ¶ VI.A. The fund includes $150 million for the first 110,000 claims remediated; $250 million for 220,000 claims remediated; $300 million for 330,000 claims remediated; $250 million for 440,000 claims remediated; $150 million for 550,000 claims remediated; and $50 million for 660,000 or more claims remediated. The Additional Remediation Amount is calculated so that if Prudential remedies more than 330,000 claims, the economic effect on Prudential, i.e. the spending of

over $1.0 billion in compensatory damages, reduces the additional remedial amounts that Prudential must pay. Although Prudential's additional remediation amount begins to decrease after 330,000 claims, Prudential's obligation to pay compensatory awards continues to increase. Thus, the net benefit to policyholders continues to increase. Indeed, the Proposed Settlement contains no cap.

D. The Unprecedented Outreach Program Will Ensure that All Class Members Are Aware of Their Rights and Will Encourage Injured Class Members to Participate in the Proposed Settlement Relief

151. The Proposed Settlement establishes an unparalleled outreach program to ensure that class members are adequately informed about the Proposed Settlement. The outreach program entails not only that each class member be provided individual notice of Proposed Settlement benefits, but also that Proposed Settlement benefits be publicized in all fifty states, through print, television, and radio. Stipulation of Settlement, at 29, ¶¶ G.5.a. to G.5.b. The outreach program includes a six-day-a-week toll-free "800" telephone number to answer class member questions. *Id.* at 30, ¶ G.5.7(a). Plaintiffs monitor the "800" number operators.

E. The Proposed Settlement Substantially Improves the Task Force Plan

1. The Proposed Settlement Provides Significant Enhancements to the Task Force Plan

a. The Proposed Settlement Provides Valuable Financial Commitments

152. The Task Force Plan contained no minimum payments, financial guarantees, nor Additional Remediation Amount. The Proposed Settlement now provides these commitments to ensure that policyholders will receive meaningful relief in the ADR process, and receive an extra-compensatory award.

b. The Proposed Settlement Improves Claim Scoring and Evaluation Criteria for the Benefit of Claimants

153. The Proposed Settlement significantly improves the claim scoring and evaluation criteria contained in the Task Force ADR Plan:

- The Proposed Settlement provides that boilerplate statements contained in policy illustrations and contracts to the effect that the dividends, interest or investment returns are "not guaranteed" or "non-guaranteed," will not independently undermine a claim. Stipulation of Settlement, Ex. B, at 9, ¶ I.D.

- The Proposed Settlement reduces from six complaints to three the number of policyholder complaints against an agent which would entitle a claimant to score of at least "2." *Id.*, Ex. B, at 5, ¶ I.C.

- The Proposed Settlement extends the period during which the complaints will be counted by nearly two and a half months, from July 9, 1996 to September 20, 1996. *Id.* The February 22, 1997 amendment extended the September 20, 1996 deadline further to February 1, 1997.

These changes greatly enhance the ability of a policyholder to establish the presumption that he or she was misled, thereby entitling the policyholder at minimum to a score of "2."

154. The Proposed Settlement also includes significant improvements in the factors and evidentiary considerations used to evaluate claims. These changes include:

- A claimant's score may be raised if documents originally kept by Prudential that could affect the scoring have improperly been destroyed and no copies can be located.[21] *Id.*, Ex. B, at 11, ¶ I.F.1.g.

- Under the Task Force ADR Plan, the score on "churning" claims can be raised if 15% of the selling agent's total sales were "financed insurance" sales. The Proposed Settlement lowers this threshold to 12% of total sales. *Id.*, Ex. B, at 15, ¶ II.B.1. (This change significantly increases the number of agents who engaged in a "pattern of financing activity" from 1987 through 1994.)

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[21] Additionally, as discussed above, on February 3, 1997, the Court implemented the agreement between Class Counsel, the Task Force, and Prudential to incorporate new and more substantial ADR provisions to account for document destruction.

- Scores on churning claims may be raised if blank, unsigned disbursement forms were used without the policyholder's consent. *Id.*, Ex. B, at 17, ¶ II.B.1.f.

- Scores on "Abbreviated Payment" or "Vanishing Premium" claims may be raised if an agent used the phrases "vanishing premium" or "vanishing point" in writing in connection with the sale of the policy at issue. *Id.*, Ex. B, at 27, ¶ III.B.1.g.

- Under the Proposed Settlement, scores on "Abbreviated Payment" claims may no longer be lowered simply because the policy lapsed prior to the date in the illustration when the premiums were to "vanish", if it appears that the policyholder became aware, prior to the misrepresented "vanish" date, that the policy would not perform as illustrated. *Id.*, Ex. B, at 28, ¶ III.B.2.f.

- The Proposed Settlement requires Prudential to contact the agent who sold the policy at issue to obtain additional information about the sale of the policy. *Id.*, Ex. C, at 6, ¶ II.G.2.b. Because agents may fear that a truthful statement in response to a claim will put their job in jeopardy, the Proposed Settlement includes an explicit recognition that Prudential will not take disciplinary action against an agent based solely on truthful representations in the "Agent Statement." *Id.*, Ex. C, at 7, ¶ II.G.2.c.

- The Task Force ADR Plan provided that Prudential had a co-equal role with the regulators in the selection of a "Representative," who would advocate on behalf of the claimant at the arbitration level. It also limited the

funding for this position to $10 million, regardless of the number of claims submitted. In the Proposed Settlement, the Representative is selected by plaintiffs' counsel, subject only to the approval of the regulators. Prudential has no role in that process. The Proposed Settlement also eliminates the cap on the funding for the Representative; under the Proposed Settlement ADR Plan, the Representative will be paid on a per claim basis. *Id.*, Ex. C, at 19-20, ¶ V.B.2.

- The Proposed Settlement creates an entirely new position, the "Claimant Representative," who is selected by Class Counsel and who will monitor the entire process on behalf of the Class Member, including the claim evaluation staff's initial claim review. *Id.*, Ex. C, at 13-14, ¶ IV.A.

c. The Proposed Settlement Includes Four Valuable ADR Remedies Not Included in the Task Force ADR Plan

155. First, the Proposed Settlement provides more interest to claimants scoring a "2." Under the Task Force ADR Plan, claimants receiving a score of "2" did not receive any interest as part of their award. Under the Proposed Settlement, as originally negotiated, claimants scoring a "2" would receive 50% of the interest that a claimant scoring a "3" would receive. *Id.*, Ex. B, at 19, ¶ II.C.1.b(ii). The Amended Stipulation dated February 22, 1997 increased the 50% interest rate to 100% for claimants who receive a score of "2" and allows rescission of the policy and a refund of the premiums, with interest. Stipulation Amendment at ¶ 2.

156. Second, where a policy lapsed before the claimant died, the Proposed Settlement allows a claim receiving a "2" to receive relief. Under these circumstances, the Task Force ADR Plan provided that a death benefit would be paid only for claims that receive a score of "3." Under the Proposed Settlement, a claim receiving a score of "2" will receive 50% of the death benefit that would have been paid if the claim had been scored a "3." Stipulation of Settlement, Ex. B, at 13, ¶ I.I.1.

157. Third, the Proposed Settlement provides full compensatory relief where a Prudential agent promised in an Abbreviated Payment or "vanishing premium" case that the claimant would have a "paid up" policy. *Id.*, Ex. B, at 29, ¶ III.C.1.c. Thus, under the Proposed Settlement, as promised, after the payment of a specified number of premiums, the policy will be fully "paid up", so that no further premiums will be due (the typical vanishing premium claim), and all dividends or interest credited to the policy will be applied to increase the cash value of the policy. *Id.* The Task Force ADR plan did not recognize this type of claim.

158. Fourth, the Proposed Settlement ADR process expressly permits claims on behalf of the decedent where the policyholder/decedent died while the policy was in force, even if a death benefit has already been paid. *Id.*, Ex. B, at 15, ¶ I.I.3. The Task Force Plan excluded policyholders who died while their policies were in force.

2. The Proposed Settlement Provides Significant Enhancements to Each Form of Basic Claim Relief and Creates a New Form of Basic Relief

159. First, the Proposed Settlement eliminates fifty basis points on Optional Premium Loans ("OPLs"). *Id.*, Ex. D, at 2, ¶ I.B.7. In the Task Force Plan, the interest rate was a short-term rate representative of Prudential's unsecured short-term cost of borrowing, plus fifty basis points.

160. Second, under the Proposed Settlement, Prudential will contribute toward Enhanced Value Policies ("EVPs") 50% of the first year's annual premium on the first annual premium due date, 25% on the third annual premium due date, 25% on the fifth annual premium due date and 15% on the seventh annual premium due date. *Id.*, Ex. D, at 5, ¶ III.A. In the Task Force Plan, Prudential contributed only 50% of the first-year annual premium toward the cash value of the EVP on the first annual premium due date.

161. Third, under the Proposed Settlement, Prudential increases its contributions to the Enhanced Value Annuities ("EVAs"). In the Task Force Plan, Prudential contributed 2% of the initial purchase price to the value of the EVA where the purchase price was less than $25,000, and 3% of the purchase price where the purchase price was between $25,000 and $50,000. Under the Proposed Settlement, in addition to these contributions, Prudential will credit 2% of the initial purchase price to the value of the EVA in the second policy year, and 1% of the

initial purchase price to the value of the EVA in the third policy year. *Id.*, Ex. D, at 6-7, ¶ IV.A.2.

162. Under the Proposed Settlement, policyholders may participate in a new form of relief – Mutual Fund Enhancements. Prudential will contribute 4% of the initial purchase price to the fund, up to a maximum of $2,000. *Id.*, Ex. D, at 9, ¶ V.A.

3. The Proposed Settlement Provides an Elaborate Program to Inform Class Members of the Relief Available to Them

163. The Proposed Settlement provides for individual notices to class members, multiple publication notices in all fifty states, the use of a toll-free "800" telephone number, staffed by trained operators monitored by Class Counsel, and multiple radio and television notices, all subject to the agreement of Class Counsel, with any disputes to be resolved by the Court. The Task Force Report did not describe how its outreach program would be implemented.

F. The Proposed Settlement Offers Significant Value to The Class

164. Plaintiffs' actuarial expert, Robert L. Hoyer of the Life & Health Actuarial Services group of Arthur Andersen LLP, placed a value of $1.187 billion inclusive of the Financial Guarantees and Additional Remediation Amount, on the ADR relief if 330,000 claims are remedied. Hoyer Aff. at ¶ 5. Hoyer states that the estimate of only 330,000 remediated claims (approximately

three percent of the class) is a conservative estimate based on evaluations of likely effects of the numerous class action settlement improvements specifically designed to increase participation. *Id.* at ¶¶ 13-14. Tillinghast-Towers Perrin concluded that the ADR program compensates the policyholder in an amount equivalent to their financial loss. Guinn Aff. at ¶ 5.

165. Plaintiffs' expert valued Basic Claim Relief at $799,600,000. Hoyer Aff. at ¶ 16. This valuation assumes 1,080,000 participants. Prudential's actuarial expert, Daniel J. McCarthy of Milliman & Robertson, Inc., estimated the value of Basic Claim Relief to be $425 million. McCarthy Aff. at ¶ 5. McCarthy's analysis also included a range of values from $272 million to $686 million. *Id.* (Plaintiffs' expert valued the enhancements to the Task Force Plan at $1.123 billion.) Hoyer Aff. at ¶ 19.

166. All of the above expert valuations exclude the value to the class of having the requested $90 million attorneys' fee paid directly by Prudential and exclude the substantial costs of providing notice and administering the entire claims process, all of which costs are to be paid directly by Prudential.

167. In his Fee Report, Stephen Greenberg valued the Proposed Settlement at between $1,209,600,000 and $2,077,000,000, exclusive of the costs of notice, the administration of the ADR process, and Class Counsel's fee. Fee Report at 56-57 & n. 10. The minimum figure is the sum of Mr. Hoyer's valuation of Basic Claim Relief ($799.6 million) and the minimum guaranteed amount to be paid in connection with the ADR process ($410 million). *Id.* at 56. The higher figure (which was not a maximum) was the

sum of Mr. Hoyer's valuation of the total Settlement ($1.987 billion) and the maximum amount of counsel fees sought by class counsel ($90 million) Significantly, no opponent of the Proposed Settlement has proffered evidence disputing these analyses.[22]

V. Class Counsel and Prudential Have Provided Class Members With Extremely Effective Individual and Published Notice of the Proposed Class and Proposed Settlement

168. This Court's October 28, 1996 Order required that individual notice be sent, by first-class mail, postage prepaid at Prudential's expense, no later than sixty days before the Fairness Hearing, to the last known addresses of all policyholders. October 28, 1996 Order. Pursuant to the Order, individual notice was sent to more than eight million present and former policyholders by first class mail on or before November 4, 1996.[23] Meade Aff. at ¶ 11.

169. The October 28, 1996 Order also required that a summary notice be published, at Prudential's expense, in the national editions of *The New York Times* (business section), *The Wall Street Journal, USA Today,* and *The Star Ledger.* In addition to these publications, Prudential published the notice in the largest circulating newspapers in

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[22] Florida, which formerly had done so, has withdrawn its purported expert's submissions.

[23] After the Court was informed that several thousand of the individual notices were returned undelivered, the Court ordered redelivery of these individual notices and extended the deadline for exclusion of the affected policyholders to January 6, 1997.

each of the fifty states and the District of Columbia. Burke Aff. at ¶¶ 3, 6. Of the sixty total newspapers utilized by Prudential, the notice appeared in thirteen newspapers on Wednesday, November 20, 1996, forty-one newspapers on Thursday, November 21, 1996, and six newspapers on Friday, November 22, 1996. *Id.*

170. The individual notice described in plain English the lawsuit, the settlement, and the options available to class members. The notice included (i) the caption; (ii) a description of the litigation; (iii) a description of the settlement class; (iv) the names of counsel for the class; (v) a description of the Proposed Settlement, including the relief available and the release to be given Prudential; (vi) the hearing date; (vii) a description of the ability to enter an appearance either individually or through counsel; (viii) the procedure and deadline for filing objections; (ix) the procedure and deadline for filing requests for exclusion; (x) the consequences of exclusion; (xi) the consequences of remaining in the settlement class; (xii) the full text of the release that would bind class members; (xiii) a description of Prudential's responsibility for plaintiffs' attorneys' fees and expenses and of its agreement to pay attorneys' fees awarded by the Court up to a maximum of $90 million; (xiv) a description of the preliminary injunction issued by the Court; and (xv) the procedure for obtaining additional information, including the toll-free "800" telephone number established to respond to class member inquiries.[24]

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[24] Prudential retained Boston Financial Data Services ("BFDS") to operate the Claimant Support Team and "800" number. Hegarty Aff. at ¶ 1. BFDS has particular experience in

171. In addition to the formal notice, the notice package sent to each class member included a six-page cover letter from Prudential's Chairman, Arthur Ryan, a twenty-one-page question-and-answer brochure, and a customized statement of eligibility. Stipulation of Settlement, Exs. F-1 to F-3. Each statement of eligibility included the class member's name and address and listed as best as practicable the class member's eligible policies and the relief available with respect to each policy.

172. The publication notice, also written in plain English, included (i) the caption; (ii) a description of the settlement class; (iii) a brief description of the settlement; (iv) the names of counsel for the class; (v) the hearing date; (vi) a description of the ability to appear at the hearing; (vii) a statement of the deadline for filing objections to the settlement; (viii) a statement of the deadline for filing requests for exclusion; (ix) the consequences of exclusion; (x) the consequences of remaining in the settlement class; (xi) a description of the preliminary

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this role, having helped to implement the settlement reached by New York Life in *Willson v. New York Life Insurance Company*, Index No. 94/127804 (N.Y.Sup.Ct.). At the parties' instruction, BFDS established a toll-free telephone hot-line in order to respond to inquiries from the Class about the Proposed Settlement and the litigation. Hegarty Aff. at ¶ 4. BFDS hired many operators and supervisors to work on this telephone bank. These personnel were trained by BFDS executives, plaintiffs' counsel, and Prudential. *Id.* at ¶¶ 5, 8. Back-up call center vendors were also hired and trained to provide additional support to BFDS as needed. *Id.* at ¶ 6. The Class Notice and all other settlement communications included the telephone number for this assistance hot-line. Stipulation of Settlement, Exs. F-1 to F-3.

injunction issued by the Court; and (xii) the procedure for obtaining further information, including a copy of the settlement notice.

173. The Court takes judicial notice of the fact that the Proposed Settlement also received press coverage, including articles put out by wire services carried in many other state, local, and trade newspapers nationwide.

174. The dates on which the individual notices were mailed and the summary notice published meant that class members had ample opportunity – approximately six to eight weeks – to consider their options before the December 19, 1996 deadline for exclusion requests and objections.

VI. The Proposed Settlement Has Been Enhanced Since the Execution of the Stipulation of Settlement

A. The Court Ordered Additional Remediation to Class Members in Response to Reported Document Destruction Incidents

175. On December 16, 1996, plaintiffs obtained an Order to Show Cause returnable on December 18, 1996 why this Court should not impose sanctions upon Prudential in connection with allegations of document destruction. On December 18, 1996, at the Order to Show Cause hearing, the Court directed Class Counsel to conduct an investigation into the alleged Cambridge office document destruction and "whether Prudential's notification on destruction of documents was or was not satisfactory." December 18, 1996 Tr. at 44. The Court directed

Class Counsel to present a Report of Investigation to the Court by December 27, 1996.

176. Between December 19 and December 24, 1996, Plaintiffs' Counsel reviewed hundreds of Prudential documents, and between December 20 and 24, 1996, conducted 56 depositions of Prudential personnel. Those depositions included Prudential's Chairman and Chief Executive Officer, Arthur F. Ryan; Prudential's Chief Financial Officer, Mark Grief; its General Counsel, James R. Gillen; other senior management and employees located at the Cambridge office; and each person identified by Prudential as having knowledge of the incident. Moreover, approximately fifty randomly selected agents were requested to complete a questionnaire to ascertain the agents' knowledge and understanding of Prudential's document preservation guidelines. Plaintiffs' Counsel also learned that there might have been similar incidents of document destruction in Prudential's Syracuse, New York office and, therefore, deposed the general manager of that office. On December 27, 1996, plaintiffs provided the Report of Investigation to the Court.

177. On January 6, 1997, the Court, having reviewed the Report and Prudential's response, found that improper document destruction had occurred and issued its findings of fact and sanctions in a written Opinion and Order, 169 F.R.D. 598.[25] The Court found specifically that:

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[25] On January 8, the Court was informed that a Prudential lawyer may have destroyed documents in Florida. On January 14, the Court appointed Special Master Justin P. Walder to investigate that alleged document destruction incident. Special Master Walder provided his report to the Court on January 24,

- Prudential's use of PROFS notes to preserve documents and to prevent their destruction was ineffective and failed to implement this Court's document preservation order;

- Various PROFS notes regarding document retention were circulated, but did not represent the systematic process necessary to preserve documents;

- Document destruction had occurred on at least four occasions: in Jacksonville, Florida; Cambridge, Massachusetts; Des Moines, Iowa; and Syracuse, New York;

- Document destruction in Cambridge was of particular concern because of its scope and because no index was prepared of the documents destroyed; the Court and the litigants had no way of knowing what documents were destroyed or from which files;

- Prudential's procedures to identify and report document destruction to senior management were unduly cumbersome and slow;

- Prudential's management had failed to establish a comprehensive document preservation policy;

- Prudential management's failure promptly to ascertain and notify the Court of the Cambridge incident was particularly inexcusable in light of the December 19, 1996 exclusion date that required Cambridge policyholders

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1997. On January 29, 1997, the Court reviewed Walder's Report and found that no improper document destruction had occurred.

to decide whether to remain in the class action;

- While there was no proof that Prudential engaged in conduct intended to thwart discovery through purposeful document destruction, its haphazard and uncoordinated approach to document retention denied plaintiffs potential evidence to establish disputed facts;[26] and
- The destroyed materials were relevant and, if available, would lead to proof of a claim.

January 6, 1997 Opinion at 612-15.

178. The Court observed also that:

- Prudential's conduct explicitly violated the Court's mandate to preserve documents;
- Document destruction had been a recurring theme throughout the litigation;
- Accusations of document destruction threatened the integrity of the Court and the proceedings before it; and
- Document destruction caused plaintiffs substantial prejudice and the Court could not ascertain whether the provisions of the ADR process which contemplate nominal, routine destruction of documents can fully address the harm incurred.

Id. at 615-16.

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[26] Under the ADR process, claims are scored with evidence from Prudential's files and the agent's files on that policy. On at least four occasions, these files have been purged of evidence that may have raised claimants' scores.

179. The Court ordered:

(1) Prudential to mail each employee a copy of the Court's September 15, 1995 Order requiring document retention with a full explanation of the pending litigation and the civil and criminal sanctions that apply to the failure to follow a court order;

(2) Prudential to submit to the Court a written manual that embodies Prudential's document preservation policy;

(3) Prudential to dedicate a telephone hotline to facilitate reports of document destruction;

(4) Prudential to require each manager to certify that his or her office complies with the document retention manual;

(5) Prudential to be sanctioned $1 million; and

(6) Prudential to reimburse Plaintiffs' Counsel for fees and costs.

Id. at 616-17.

180. The Court also provided that these sanctions were "without prejudice to the subsequent imposition of additional sanctions as may be fair and appropriate to remedy unknown harm to individual party opponents caused by document destruction." *Id.* at 617.

181. Pursuant to this statement, Class Counsel and Prudential negotiated additional procedures and criteria for scoring claims where evidence indicates that relevant documents have been destroyed. *See generally* February 3, 1997 Order. Under the supervision of the Court, plaintiffs and the Regulatory Oversight Staff will undertake a

nationwide investigation of document destruction in Prudential's offices. *Id.* at 1-2. Now, claimants will receive enhanced scores depending on whether the document destruction was improper, whether there is a known impact on a specific file, and whether the destroyed document was material:

- Where documents material to the claim under review were destroyed, the claimant will automatically receive a score of "3" if the destruction was improper or the documents impacted the claimant's file. Even if the destruction was not improper or there is no known impact on the specific file, the claimant will receive a score of not less than "2," and a score of "3" will be awarded if the claim otherwise would have been scored a "2."

- Where it cannot be determined whether the documents were material to the claim, the claimant will receive a score of "3" if the destruction was improper *and* the documents impacted the claimant's file. If documents of unknown materiality were destroyed and the destruction was either improper *or* impacted the claimant's file, the claimant will receive a score of not less than "2," and a score of "3" will be awarded if the claim otherwise would have been scored a "2."

- Where it cannot be determined whether the documents were material and the destruction was neither improper nor had any known impact on the file, the claimant's score will be increased by one point, to a maximum score of "3."

Id., Ex. A.

B. Through Negotiations with State Regulators Prudential Has Agreed to Several "Final Enhancements" to the Proposed Settlement

182. In the days before the Fairness Hearing, Prudential agreed with the remaining state objectors to add several meaningful enhancements to the Proposed Settlement. These included:

- The Complaint History cut-off was extended to February 1, 1997; Stipulation Amendment at ¶ 1.

- The interest rate on scores of "2" was increased from 50% to 100%; *Id.* at ¶ 2.

- A non-specific evidentiary consideration was added to the ADR Guidelines to allow the claim evaluator to consider that the policyholder was age sixty years or older at the time of sale; *Id.* at ¶ 3.

- A claim-resolution factor was added to allow a claimant with a life insurance application containing an unauthorized signature to receive an automatic score of "3"; *Id.* at ¶ 4.

- Prudential must "[p]rovide claimants who so request with current information with respect to the existence of any outstanding loans, their most recent dividend payments, their dividend status, and, where applicable, their currently illustrated year of abbreviation;" *Id.* at ¶ 5.

VII. Class Response to the Proposed Class Certification and the Proposed Settlement Has Been Favorable

183. The Proposed Settlement has received overwhelming class support. The Court has received an opt-out list representing 23,421 policies, or about 19,000 policyholders. This represents about .24% of the class.

184. In addition to the exclusion requests, a total of approximately 295 written communications were served upon counsel and/or filed with the Court in compliance with, or in an apparent attempt to comply with, the procedures for objecting described in the Class Notice authorized by this Court in its October 28, 1996 Order. Pls. Certif. Reply, Ex. A.

185. The Class Action Administrator has received over 500,000 telephone inquiries on the "800" number provided for policyowners to obtain further information about the proposed settlement. Hegarty Supp. Decl. at ¶ 2.

186. Regulators of all fifty states and the District of Columbia have endorsed the Proposed Settlement. Task Force participants have ordered Prudential to seek prompt approval of the Proposed Settlement, because the Proposed Settlement is in "the best interests of the policyholders." Biederman Aff. at ¶ 7 (quoting Amended Consent Orders).

VIII. The Fairness Hearing Provided the Parties, Objectors Appearing Through Counsel, State Regulators, and All Individual Objectors an Opportunity to Express Their Positions to the Court

187. Pursuant to this Court's October 28, 1996 Order, Prudential mailed individual notices of the Proposed Settlement to approximately eight million policyholders who collectively own or owned approximately ten million policies. Additionally, Prudential published a summary notice in *The New York Times, The Wall Street Journal, USA Today,* and in major newspapers in all fifty states. The Class Notice directed class members who had objections to the Proposed Settlement to file their objections with the Court no later than December 19, 1996. October 28, 1996 Order at ¶ 13.

188. Subsequently, the Court ordered that the Fairness Hearing be moved to February 24, 1997.[27] January 6, 1997 Order. Because of this adjournment, the Court extended the deadline by which objectors could file supplemental objections to January 14, 1997, provided that their materials referred to the issues already filed in the initial objections. *Id.* at ¶ 4. The Court further ordered that Prudential and Class Counsel could speak for two hours each, states thirty minutes each, and objectors fifteen minutes each. *Id.* at ¶ 12.

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[27] The Court determined that rescheduling was appropriate, because the document destruction investigation, including the taking of fifty-six depositions related to document destruction in Prudential's Cambridge office, adversely affected Class Counsel's ability to prepare for the Fairness Hearing.

189. On February 21, 1997, the Court was advised that the state objectors were withdrawing their objections. Accordingly, the Court notified those individual objectors who had filed written objections that they would have additional time to speak.

190. On February 24, 1997, the Court held the Fairness Hearing to determine whether the class should be certified and whether the Proposed Settlement was fair, reasonable, and adequate.

191. Prior to the hearing, Class Counsel[28] and Prudential[29] had fully briefed and supported their positions

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[28] In particular, the Court considered the testimony submitted by plaintiffs' experts through affidavits, affirmations and declarations in support of the Proposed Settlement, including those from H. Russel Bernard, Professor of Anthropology at the University of Florida regarding the content of the Class Notice; Joel Cohen, Professor of Marketing, Professor of Anthropology and Director of the Center for Consumer Research at the University of Florida, regarding the use of surveys as evidence; Dean John E. Sexton of New York University Law School regarding the structure of the Proposed Settlement, the jurisdiction of the Court and due process considerations of the Class Notice; Professor Arthur R. Miller, Bruce Bromley Professor of Law at Harvard Law School regarding the appropriateness of class certification pursuant to Rule 23(b)(3); Professor Samuel Issacharoff, Charles Delford McCormick Professor of Law at the University of Texas, regarding whether the action's claims were appropriate for treatment as a nationwide class action; Professor Georgene M. Vairo regarding jurisdiction; and Robert L. Hoyer of Arthur Andersen LLP, regarding the valuation of the Settlement.

[29] The Court considered testimony submitted by Prudential from its experts, including Esther Milnes, Vice President and Actuary of Prudential Insurance Company of America,

with extensive affidavits and exhibits. At the hearing, both parties made substantial and informative presentations.

192. Objectors also briefed and provided support for their positions prior to the hearing. At the hearing, several objectors made presentations: Johnson, Beauvias, Treadway, Parnell, Ginsberg, Krell, Chin, Helton, the Gradys, and several hundred policyholders represented by UAW-Ford-General Motors-Chrysler Legal Services Plan.

193. Several state insurance regulators also provided the Court with their views of the Proposed Settlement. New Jersey filed papers in support of the Proposed Settlement on its own behalf and submitted letters of support from state insurance regulators across the nation. Massachusetts, Texas, California, and Florida had filed objections to various aspects of the Proposed Settlement, but all states withdrew their objections at or before the hearing. As a result, the Proposed Settlement was joined and supported by every insurance regulator in the nation.

194. The Court permitted any participant to submit proposed findings of fact and conclusions of law by Monday, March 3, 1997. Thereafter, Class Counsel, Prudential, intervenor Richard Johnson, the Krell objectors, objector

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regarding the mechanics and performance of certain Prudential life insurance products; Patricia L. Guinn and George J. Hebel, Jr., principals of Tillinghast-Towers Perrin, regarding the estimated pre-tax cost to Prudential of the ADR process of this Settlement; and Daniel J. McCarthy and Dale S. Hagstrom of Milliman and Robertson, Inc. regarding the valuation and cost to Prudential of the Basic Claim Relief portion of the Settlement.

Beauvias, and objectors Treadway, Parnell, and Ginsberg each submitted proposed findings of fact and conclusions of law.

CONCLUSIONS OF LAW

I. This Court Has Subject Matter Jurisdiction Over Plaintiffs' Claims Against Prudential

1. After full consideration of the arguments presented and the applicable law, the Court finds that its exercise of subject matter jurisdiction over this case is appropriate.[30] The Court asserts both federal question and federal diversity jurisdiction over the entire action.

A. This Court Unquestionably Has Federal Question Jurisdiction Over this Action

2. Plaintiffs allege, and this Court agrees, that the Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1337, and has supplemental jurisdiction under 28 U.S.C. § 1367. Second Am. Compl. at ¶ 2. Plaintiffs allege claims under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b) and 78t(a)) and under Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission (17

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[30] The Court will address whether it has jurisdiction only over the class action plaintiffs, named and unnamed. The Court reserves the decision whether to remand the opt-out actions, which Prudential removed to federal court and the MDL panel transferred here. The Court will address that issue in April of 1997.

C.F.R. § 240.10b-5) and common law claims. Second Am. Compl. at ¶ 1.

3. Specifically, named plaintiff Martin Dorfner asserts claims against Prudential and the individual defendants under Sections 10(b) and 20(a) of the Securities Exchange of 1934 and for violation of Rule 10b-5. Second Am. Compl. at ¶¶ 1, 130-45, 181-96. Martin Dorfner alleges that, as a part of Prudential's scheme to defraud life insurance policyholders, Prudential sold him a VAL policy in violation of federal securities laws using fraudulent sales practices in violation of various state laws.

4. This Court has jurisdiction over Dorfner's federal securities claims, and the federal securities claims of other similarly situated plaintiffs, under 28 U.S.C. §§ 1331 and 1337. Indeed, there is no dispute that the Court has exclusive "federal question" subject matter jurisdiction over plaintiffs' federal securities fraud claims under 15 U.S.C. § 78aa and 28 U.S.C. § 1331. Plaintiffs' federal securities laws claims are more than just "colorable;" they survived Prudential's motion to dismiss. May 10, 1996 Order; *cf. Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1280-81 (3d Cir.1993) (dismissal for lack of subject matter jurisdiction is appropriate only if the right claimed is so "insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy") (quoting *Kulick v. Pocono Downs Racing Ass'n, Inc.*, 816 F.2d 895, 899 (3d Cir.1987)).

5. This Court has jurisdiction also over the remaining claims of these class members and the other class

members in this action, because all of the claims are part of the same "case or controversy under Article III of the United States Constitution," and, therefore, the additional claims are within this Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367.[31] Under section 1367, the Court has supplemental jurisdiction over all claims that are so closely related that they form part of the same case or controversy under Article III. *Id.* This is true even where the claims involve additional parties. *Id.*

6. Claims are "so closely related" that they form part of the "same case or controversy" if the claims share "significant factual elements." *See HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1198 (3d Cir.1996); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir.1991) ("Claims are part of the same constitutional case if they derive from a common nucleus of operative fact. . . . ' ") (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966)).

7. Here, the state law claims are part of the same case or controversy as the federal claims because the

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[31] Section 1367(a) provides in pertinent part:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the *same* case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a) (emphasis added).

claims are inextricably factually intertwined.[32] Dorfner and others allege that Prudential sold its VAL policies in violation of federal laws through the financing mechanisms and other deceptive sales practices that comprise plaintiffs' state law claims. All the claims are premised upon a common course of conduct by Prudential; all relate to the same alleged companywide development and implementation of the patently fraudulent sales techniques.[33] *See Palmer v. Hosp. Auth. of Randolph County*, 22 F.3d 1559, 1563-64 (11th Cir.1994) ("same case or controversy" satisfied where claims related to the same course of events, and would involve the same witnesses, presentation of the same evidence, and determination of the same, or very similar, facts); *cf. In re IGI Sec. Litig.*, 122 F.R.D. 451, 461 (D.N.J.1988) (pendent state law negligent misrepresentation claim certified when claims presented essentially same issues asserted by federal securities law claims).

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[32] No objector, including Krell, disputes that plaintiffs' state law claims are sufficiently related to plaintiffs' federal securities law claims that they form part of the "same case or controversy."

[33] Because section 1367 extends jurisdiction over the entire case or controversy, it applies to both pendent parties and pendent claims. *See Borough of W. Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir.1995); *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir.1995); *see generally* 13B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper § 3567.3, at 48 (Supp.1996) (and numerous authorities cited therein). Indeed, the statute expressly so provides. *See* 28 U.S.C. § 1367(a) (supplemental jurisdiction "shall include claims that involve the joinder or intervention of additional parties.").

8. Where the original federal jurisdiction claim would proceed to trial absent settlement, as is true in this case, to promote judicial economy and the convenience of and fairness to the parties, the district court should exercise jurisdiction over state claims based on the same nucleus of operative facts unless there exists some substantial countervailing consideration. *See Lancaster,* 45 F.3d at 788; *Sparks v. Hershey,* 661 F.2d 30, 33-34 (3d Cir.1981) ("This is especially true where it is desirable to avoid the possibility of duplicating the recovery of damages."). Because there are no substantial countervailing considerations, the Court will exercise its discretion to take jurisdiction over the entire case.[34] *See Growth*

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[34] Section 1367(c) provides

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

The Court concludes also that these four exceptions to supplemental jurisdiction do not preclude this Court's exercise of supplemental jurisdiction. First, plaintiffs' state law claims raise numerous issues common to the federal securities claims, ensuring the predominance of common factual and legal issues over the individual issues raised by any particular claim. *Cf. Lancaster,* 45 F.3d at 789 ("The substantially predominate' standard . . . is not satisfied simply by a numerical count of the state and federal claims the plaintiff has chosen to assert on the

Horizons, 983 F.2d at 1285 n. 14 (noting that section 1367 "states that federal courts *shall* exercise supplemental jurisdiction over pendent claims arising out of the same case or controversy and *may* decline to exercise jurisdiction if all federal claims are dismissed") (emphasis in original); *Stehney v. Perry*, 101 F.3d 925, 939 (3d Cir.1996) (decision to exercise supplemental jurisdiction is committed to district court's jurisdiction).

9. Accordingly, the Court unquestionably has supplemental jurisdiction over the entire dispute and the Proposed Settlement and will exercise its jurisdiction. *See, e.g., Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1305 (3d Cir.1993) (subject matter jurisdiction in nationwide class settlement of federal and state law claims premised on 15 U.S.C. § 78aa, 28 U.S.C. § 1331, and 28 U.S.C. § 1367).

B. The Court Also Has Diversity Jurisdiction Over this Action

10. Plaintiffs allege that this Court has subject matter jurisdiction over this action also pursuant to 28 U.S.C. § 1332, and the Court agrees. Second Am. Compl. at ¶ 3.

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basis of the same set of facts."). Second, the state law claims are not novel or complex and the state laws have been categorized for manageability at trial. *See generally* Issacharoff Aff. Third, the Court has not and likely will not dismiss the federal securities fraud claim over which it has original jurisdiction; indeed, the Court previously refused to do so. Fourth, there are no "exceptional circumstances" providing "compelling reasons" to decline jurisdiction. Indeed, all of the reasons that support the superiority of nationwide class certification in this action support also the discretionary exercise of supplemental jurisdiction here.

The named plaintiffs and defendants are citizens of diverse states. *Id.* Plaintiffs allege that each named plaintiff meets the $50,000 amount in controversy requirement because each plaintiff lost more than $50,000 exclusive of interest and costs in "insurance coverage, premiums paid, dividends and/or interest income and accumulated cash values." *Id.* Plaintiffs allege that each meets the $50,000 threshold also because of the punitive damages and attorneys fees requested, in which each plaintiff allegedly has an undivided interest. *Id.*

11. Section 1332 of title 28 provides that this Court has jurisdiction over civil actions between citizens of different states where the amount in controversy exceeds the sum of $50,000 exclusive of interest and costs. 28 U.S.C. § 1332; *see Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1044 (3d Cir.), *cert. denied*, 510 U.S. 964, 114 S.Ct. 440, 126 L.Ed.2d 373 (1993). In a class action suit, diversity between citizens requires that there must be complete diversity between the named representatives of the class and the defendants. *See In re School Asbestos Litig.*, 921 F.2d at 1317 (observing that only named plaintiff must be diverse to establish diversity). The objectors do not dispute that the diversity of citizenship requirement is satisfied.

12. The parties contest, however, whether this action satisfies the amount in controversy requirement. Objectors contend that plaintiffs fail to satisfy the amount in controversy requirement for a class action because each member's claim must and cannot satisfy the jurisdictional minimum. The party asserting federal subject matter jurisdiction must demonstrate that the amount in controversy requirement is satisfied. *See Packard*, 994 F.2d

at 1045. The face of the complaint determines jurisdiction if the claim appears to be made in good faith: "The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that . . . the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *See Id.* at 1045-46 (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938)). If the Court finds to a "legal certainty" that the threshold amount is not met, then this Court must reject federal diversity jurisdiction. *See St. Paul Mercury Indem. Co.*, 303 U.S. at 290, 58 S.Ct. at 591; *see also Columbia Gas Transmission Corp. v. Tarbuck*, 62 F.3d 538, 541 (3d Cir.1995) ("dismissal is appropriate only if the federal court is certain that the jurisdictional amount cannot be met"); *Suber v. Chrysler Corp.*, 104 F.3d 578, 583 (3d Cir.) (same). Members of a class may not aggregate their claims to reach the $50,000 amount in controversy requirement. *See Zahn*, 414 U.S. at 301, 94 S.Ct. at 512; *Packard*, 994 F.2d at 1045 (citing *Snyder*, 394 U.S. at 334, 89 S.Ct. at 1055-56).

13. Where plaintiffs seek equitable relief pertaining to the enforcement of insurance policies, the face value of the policy is the measure of the amount in controversy. While Krell contends that the measure should be the cash surrender value or some other figure,[35] courts have

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[35] Krell complains that Lead Counsel denied Krell's November 8, 1996 request to depose named plaintiff Dorfner to determine whether he, in fact, had a claim exceeding $50,000. Krell Brief at 26. Although Krell correctly observes that it is the plaintiffs' burden to establish which named plaintiffs have claims exceeding $50,000, Krell erroneously assumes that he is entitled to discovery into this matter. *See* 1 *Newberg* § 3.33, at

uniformly held that, where the validity of the policy is at issue, the proper measure is the face value. *See, e.g., Bell v. Preferred Life Assurance Soc'y,* 320 U.S. 238, 240, 64 S.Ct. 5, 6, 88 L.Ed. 15 (1943) ($1,000 face value of insurance certificate, not the $202 in premiums, satisfied amount in controversy requirement in action concerning certificate purchased as a result of fraudulent misrepresentations); *Stephenson v. Equitable Life Assurance Soc'y,* 92 F.2d 406, 410 (4th Cir.1937) (life insurance face value, plus value of double indemnity feature, was amount in controversy in suit seeking declaratory relief restoring policy to force); *Guardian Life Ins. Co. of America v. Muniz,* 101 F.3d 93, 94 (11th Cir.1996) (face value of policy, not loan value, cash surrender value, or paid-up value of polices [sic], was amount in controversy in insurer's action seeking cancellation of life insurance policies); *New York Life Ins. Co. v. Swift,* 38 F.2d 175, 176-77 (5th Cir.1930) (same).

14. The Supreme Court had held that each member of a class action must meet the amount in controversy requirement to establish diversity jurisdiction. *Zahn v. International Paper Co.,* 414 U.S. 291, 301, 94 S.Ct. 505, 512, 38 L.Ed.2d 511 (1973); *Snyder v. Harris,* 394 U.S. 332, 338, 89 S.Ct. 1053, 1057-58, 22 L.Ed.2d 319 (1969). But, plaintiffs no longer have to comply with the *Zahn* rule because

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3-158 ("[C]ourts are sharply curtailing inquiries into and attacks on the personal circumstances of plaintiffs who seek to represent a class."). There is a potential for such discovery to be "harassing and oppressive on representatives who seek to bring meritorious class litigation." *See Id.* at 3-158 to 3-159. And Krell has indicated no basis to doubt Dorfner's claims.

Zahn was effectively overruled by 28 U.S.C. § 1367.[36] Only the named plaintiff must satisfy the jurisdictional amount in controversy requirement. Although the Third Circuit has not yet addressed the issue, *see, e.g., Packard*, 994 F.2d at 1045-46 n. 9, a plain reading of section 1367(a) clearly permits the exercise of supplemental jurisdiction over class plaintiffs' claims that do not meet the amount in controversy requirement. *See In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir.1995) (holding that a plain reading of section 1367 overrules *Zahn*); *Deep v. Manufacturers Life Ins. Co.*, 944 F.Supp. 358, 363 (D.N.J.1996) (same); Vairo Affirm. (observing that plain meaning of section 1367 supports finding that section 1367 overruled *Zahn*); *see also Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928, 930 (7th Cir.1996) (holding that by its plain meaning section 1367 overrules *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 (1939), in which the Supreme Court held in a non-class action case that each plaintiff's claim must satisfy the amount in controversy

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[36] Section 1367(b) provides:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, over claims by persons proposed to be joined or as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(b).

requirement); *Gandolfo v. U-Haul International, Inc.*, Civ. No. 95-4393, at 5 (D.N.J. Dec. 19, 1996) (holding that district court can exercise supplemental jurisdiction over a co-plaintiff claim that fails to meet the amount in controversy requirement) *Lindsay v. Kvortek*, 865 F.Supp. 264, 276 (W.D.Pa.1994) (same).

15. Section 1367(a) authorizes the exercise of supplemental jurisdiction over class members' claims that fail to meet the amount in controversy requirement, because section 1367(a) unequivocally confers jurisdiction on the district court over "*all* other claims that are so related to the claims in the action within such original jurisdiction that they form part of the came case or controversy." *See, e.g., In re Abbott Labs*, 51 F.3d at 528-29; *Stromberg*, 77 F.3d at 931. Class members' claims that may fail to meet the amount in controversy requirement certainly form part of the same "case or controversy" as the class members' claims that meet the threshold amount.

16. Moreover, section 1367(b) disallows 1367(a) supplemental jurisdiction over claims founded solely on diversity and joined by certain Rules, specifically Federal Rules of Civil Procedure 14, 19, 20, and 24; Federal Rule of Civil Procedure 23, however, is not among the enumerated exceptions. Under the maxim *expressio unius est exclusio alterius*, the presence of these exclusions and the absence of Rule 23 on the list confirms the propriety of the exercise of supplemental jurisdiction in a Rule 23 class action case over plaintiffs' claims that may fail to meet the jurisdictional threshold amount.

17. The Court is not persuaded by the reasoning of the courts that have refused to exercise supplemental

jurisdiction over class members' claims where a named plaintiff has satisfied the amount in controversy requirement, *see, e.g., DeCastro v. AWACS, Inc.*, 935 F.Supp. 541, 547 (D.N.J.1996) (refusing to exercise jurisdiction where named plaintiffs failed to satisfy threshold amount in controversy); *Garcia v. General Motors Corp.*, 910 F.Supp. 160, 164 (D.N.J.1995) ("To date, *Zahn* and *Packard* remain good law in the Third Circuit. Accordingly, GMC must establish that each of the Putative Plaintiffs meets the amount-in-controversy requirement."); *In re Potash Antitrust Litig.*, 866 F.Supp. 406 (D.Minn.1994) (summarizing pro-*Zahn* and anti-*Zahn* cases). Maintaining that they are bound by *Zahn*, these courts rely on the legislative history of section 1367 to suggest that section 1367 did not overrule *Zahn*: "[T]he section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R.Rep. No. 101-734, 101st Cong., 2d Sess. 29, 76-77 (1990), *reprinted in* 1990 U.S.S.C.A.N. 6802, 6875.

18. But, because the plain language of the statute is clear and the legislative history that these cases quote conflicts with the facial meaning of the statute, the Court cannot consider that history. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337-38, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994); *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98-99, 111 S.Ct. 1138, 1146-47, 113 L.Ed.2d 68 (1991); *In re Continental Airlines, Inc.*, 932 F.2d 282, 287 (3d Cir.1991). Moreover, less frequently cited legislative history of section 1367 demonstrates that the Federal Courts Study Committee ("FCSC"), which recommended the enactment of section 1367 to Congress,

informed Congress that *Zahn* made little sense from a policy standpoint. Vairo Affirm. at 3 (citing 1 FCSC Working Papers And Subcommittee Reports 560, 561 n. 33 (1990)). Indeed, the FCSC proposal, which is "fairly similar to the statutory language ultimately adopted," advised Congress to overrule *Zahn*. Vairo Affirm. at 3.

19. In this case, the named plaintiffs have alleged claims exceeding $50,000 each. The Second Amended Complaint states that "each Plaintiff lost more than $50,000 (exclusive of interest and costs) in insurance coverage, premiums paid, dividends and/or interest income and accumulated cash values. . . . " Second Am. Compl. at ¶ 3.[37] Furthermore, the face value of the policies alone for each of the named plaintiffs exceeds $50,000. Mrs. Nicholson alleges that she purchased a $100,000 policy from Prudential as a result of Prudential's common deceptive scheme. Second Am. Compl. at ¶ 13. The Kuchases complain that they purchased $100,000 and $80,000 policies as a result of the scheme. Second Am. Compl. at ¶¶ 15-16. Mr. Gassman argues that he was persuaded to contribute the funds of his $20,000 Certificate of Deposit into a variable appreciable life policy with a face value of $150,000. Second Am. Compl. at ¶¶ 161-64.

20. Alternatively, even if the face value of the policy were not determinative of the amount in controversy, the Court clearly has jurisdiction over Ms. Nicholson's claims

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[37] While each plaintiff also claims an undivided interest in punitive damages exceeding $50,000, see Second Am. Compl. at ¶ 3, the Court need not address the argument, because named plaintiffs satisfy the amount in controversy requirement without punitive damages.

and supplemental jurisdiction over the remaining claims under section 1367. Ms. Nicholson lost over $100,000 in actual death benefits. Ms. Nicholson expressly alleges that, due to Prudential's wrongful conduct, upon the death of her husband in August 1994, the $130,376 in insurance coverage that she expected from the Prudential life insurance policies sold to her had dwindled to $22,514.43. Second Am. Compl. at ¶ 118.

21. Krell's challenges to plaintiffs' ability to satisfy the amount in controversy requirement are legally incorrect and Krell fails to establish that, to a "legal certainty," the named plaintiffs' claims fail to exceed $50,000.[38] Krell argues that the amount in controversy requirement is not satisfied because policyholders are likely to recover only several thousand dollars in compensatory damages and because the total damages requested in the Second Amended Complaint substantially exceed Prudential's net worth and could not be awarded. Krell Brief at 26. A judgment or settlement for less than the jurisdictional amount does not indicate a failure to meet the amount in controversy requirement for purposes of establishing diversity jurisdiction. *See, e.g., Suber,* 104 F.3d at 583 ("Once a good faith pleading of the amount in controversy vests the district court with diversity jurisdiction, the court retains jurisdiction even if the plaintiff cannot ultimately prove all of the counts of the complaint or

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[38] Krell is represented by Michael Malakoff. The Court notes that during this Court's hearing on whether to remand Michael Malakoff's other action, the *Kittle* action, to state court in West Virginia, Mr. Malakoff refused to waive his client's claim to damages exceeding $50,000. *See* December 13, 1995 Tr. 68.

does not actually recover damages in excess of $50,000.") (citation omitted). Therefore, the Court rejects Krell's arguments, because whether the amount in controversy is satisfied turns on plaintiffs' allegations in the complaint and not on the defendant's financial condition or on the ultimate resolution of plaintiffs' claims. *See Packard*, 994 F.2d at 1045-46 (citation omitted).

22. Consequently, because plaintiffs' allegations satisfy the amount in controversy and because it does not appear to a legal certainty that the claim is really for less than the jurisdictional amount, the Court finds also that it has subject matter jurisdiction over plaintiffs' claims by virtue of its diversity jurisdiction.

II. The Court's Jurisdiction over Plaintiffs' Claims Does Not Violate the Article III Case or Controversy Requirement

23. This case presents a "case or controversy" under Article III of the United States Constitution. The underlying tenents of the "case or controversy" requirement are ripeness and standing. "Standing focuses on whether the type of injury alleged is qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff has personally suffered that harm, whereas ripeness centers on whether that injury has occurred yet." *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir.1994) (quoting Erwin Chemerinsky, *Federal Jurisdiction* 99 (1989)). The presence of an Article III "case or controversy" is determined vis-a-vis the named parties. *See Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974) (class members need not

individually demonstrate standing); *see generally Herbert Newberg & Alba Conte, Newberg on Class Actions* § 2.05, at 2-29 (3d ed. 1992) ["*Newberg* "] ("Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense").

24. While Krell concedes that each named plaintiff has alleged a cognizable claim against Prudential that gives rise to a "case or controversy," Krell raises novel variations on the case or controversy theme. Krell Brief at 39-41. First, Krell mistakenly argues that because the class is defined to include all Prudential policyholders from 1982 to 1995, some of these policyholders may not have been injured by Prudential and, therefore, this entire case does not constitute a "case or controversy." Krell again presents no authority, and the Court is aware of none, for the notion that the Court has no jurisdiction over this action merely because *some* class members may not currently assert a claim. The current class definition is similar to many commonly accepted definitions. The current class is akin, for example, to those used in securities fraud class action cases, which commonly define a class to include all purchasers of the defendant company's common stock during a specified period of time. *See, e.g., Green v. Wolf Corp.*, 406 F.2d 291, 299 (2d Cir.1968), *cert. denied*, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969). The current class also bears resemblance to a class defined to include all purchasers of a specific product, the court having deferred the issue of whether individuals have suffered injury and what those injuries are to a subsequent procedure. *See, e.g., In re Asbestos School Litig.*,

104 F.R.D. 422, 424, 433-34 (E.D.Pa.1984), *aff'd in pertinent part*, 789 F.2d 996, 998-99, 1008-11 (3d Cir.1986) (certifying Rule 23(b)(3) opt-out class of "essentially all public school districts and private schools in the nation"). Indeed, class action experts encourage plaintiffs to define a class in similar objective terms, without regard to the merits of the claim or the specific relief sought. *See* 2 *Newberg*, § 6.14, at 6-61; *Manual for Complex litigation* § 30.14 (3d ed. 1995).

25. Second, in his Supplemental Objection, Krell raises a new "case or controversy" argument. He contends that any "case or controversy" ceases upon Court approval of the Proposed Settlement, depriving the Court of continuing jurisdiction to determine the method to allocate settlement funds such as the Additional Remediation Amount. Krell Supp. Obj. at 3. It is well settled, however, that this Court may retain jurisdiction to supervise the fulfillment of the Proposed Settlement, even after a final judgment has been entered and the appeal period has expired. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 380-82, 114 S.Ct. 1673, 1676-77, 128 L.Ed.2d 391 (1994) (a district court's explicit retention of jurisdiction over a settlement agreement, or its incorporation of that agreement into its final order, satisfies any jurisdictional concerns); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 336 (E.D.Pa.1994) (district court expressly retained jurisdiction over settlement), *vacated on other grounds by*, 83 F.3d 610 (3d Cir.), *cert. granted sub nom., Amchem Prods. v. Windsor*, ___ U.S. ___, 117 S.Ct. 379, 136 L.Ed.2d 297 (1996); 2 *Newberg* § 11.33, at 11-67 (and numerous authorities cited therein).

III. The Court Has Personal Jurisdiction over All Plaintiffs, Present and Absent

26. This Court has personal jurisdiction over all class members. A court acquires personal jurisdiction over absent class members after class notice has been sent and potential class members have been given the opportunity to exclude themselves from the class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 199 (3d Cir.1993). In this case, over eight million policyholders received individual and publication notice of the proposed class action in the first week of November of 1996 and had until December 19, 1996 to opt out. The policyholders who have not excluded themselves from the class are deemed to have implicitly consented to this Court's jurisdiction. *See Shutts*, 472 U.S. at 812, 105 S.Ct. at 2974-75; *Carlough*, 10 F.3d at 199.

27. Krell cites *Phillips Petroleum* for the proposition that a class action defendant cannot assert a *res judicata* defense against absent class members if the district court enters a class action judgment without proper personal jurisdiction over an absent party. Krell Supp. Obj. at 2. Krell's observation is axiomatic, but irrelevant. As is style, Krell does not reason an argument, but expects the Court to extrapolate Krell's intended meaning.[39] The Court gathers that Krell impliedly argues that this Court

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[39] While Krell fires his arguments at the Court as buckshot in the air, hoping to hit at least something, the Court, nonetheless, has devoted considerable attention to his submissions. Krell's legal concerns deserve the attention of the Court despite his counsel's slipshod approach.

has no personal jurisdiction over absent plaintiffs. But, as discussed previously, the Court clearly has personal jurisdiction over absent individual plaintiffs. Because Krell has offered absolutely no support for the argument, and the Court is not aware of any, the Court rejects the argument.

IV. The Predominance of Common Factual and Legal Issues, the Adequacy of Class Counsel and Class Representatives, and the Superiority of the Class Action Device as a Tool to Resolve the Current Controversy Require Class Certification

28. Class certification "enables courts to treat common claims together, obviating the need for repeated adjudications of the same issues." *General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 783 (3d Cir.), ["*GM Trucks*"], *cert. denied*, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995). The class action device achieves also other very important objectives: "the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous claimants with similar claims." *Id.* at 783-84 (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03, 100 S.Ct. 1202, 1212, 63 L.Ed.2d 479 (1980)). The last goal has particular significance because without spreading litigation costs many injured individuals will be unable to obtain relief: "When it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any

effective redress unless they may employ the class action device." *Id.* at 784 (citation omitted).

29. Courts increasingly have used the class action device in cases, such as this one, in which a class of policyholders has sued an insurance company for misrepresentations in the sale of insurance policies and benefit plans. *See, e.g., Reserve Life Ins. Co. v. Kirkland*, 917 S.W.2d 836 (Tex.App.1996); *Janicik v. Prudential Ins. Co. of America*, 305 Pa.Super. 120, 451 A.2d 451 (1982). And several courts have certified classes of policyholders suing insurance companies other than Prudential in cases involving deceptive sales practices identical to those that the plaintiffs now allege Prudential has committed. *See, e.g., Willson v. New York Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652 (N.Y.Sup.Ct. July 31, 1995) (certifying settlement class in vanishing premium case), *aff'd* 228 A.D.2d 368, 644 N.Y.S.2d 617 (1996); *Goshen v. Mutual Life Ins. Co. of New York*, No. 95-600466 (N.Y. Sup.Ct. June 7, 1996) (certifying class in case involving both vanishing premium and churning allegations).

A. The Proposed Settlement Class Must Be Certified as if The Case Were to Be Tried

30. Federal Rule of Civil Procedure 23 allows the Court to certify a class for settlement purposes only. *GM Trucks*, 55 F.3d at 778. A settlement class is "a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments against certification." *Id.* at 786. The settlement class is an

"extremely valuable" device to dispose of major and complex class actions. *See id.* Despite the absence of statutory guidance for settlement classes, courts have routinely established temporary classes for settlement purposes only. *See id.* (gathering authority).

31. In certifying a class for settlement purposes, the Court must abide by the ordinary Rule 23 requirements: "Rule 23 permits courts to achieve the significant benefits created by settlement classes so long as these courts abide by all of the fundaments of the Rule." *See id.* at 778 (holding that Rule 23(a) requirements must be satisfied as if class were to litigate its claims); *see also Georgine*, 83 F.3d at 617 (holding that Rule 23(b) requirements must be satisfied as if class were to litigate its claims). Thus, a settlement class must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation and the Rule 23(b) requirements. *See GM Trucks*, 55 F.3d at 778. In this case, because the settlement proponents seek to certify the class under Rule 23(b)(3), the class must satisfy this provision's superiority and predominance standards. *See id.*

32. The Court must consider the propriety of certification as if the case were to go to trial: "[D]espite the possibility that settlement-only class actions might serve the 'useful purpose of ridding the courts' of the 'albatross[ ]' represented by mass tort actions, the rule in this circuit is that settlement class certification is not permissible unless the case would have been 'triable in class form.' " *Georgine*, 83 F.3d at 625 (citing *GM Trucks*, 55 F.3d at 799-800). Moreover, the Third Circuit has held that this Court cannot consider the Proposed Settlement's possible

amelioration of the Court's manageability concerns. *See id.* at 625-26.

33. The Court must enumerate findings of fact to establish each of the Rule 23 requisites. *See id.* Although the Court may look beyond the pleadings to determine whether a motion for class certification should be granted, the Court should not resolve the merits of the plaintiffs' claims. *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970) ("whether there is a proper class does not depend on the existence of a cause of action"); *Gunter v. Ridgewood Energy Corp.*, 164 F.R.D. 391 (D.N.J.1996). In a borderline case, the Court should allow class certification: "the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir.) (citations omitted), *cert. denied*, 474 U.S. 946, 106 S.Ct. 342, 343, 88 L.Ed.2d 290 (1985); *see Walsh v. Pittsburgh Press Co.*, 160 F.R.D. 527, 529 (W.D.Pa.1994) [*"Walsh v. Pittsburgh"*] (citing *Hoffman Elec., Inc. v. Emerson Elec. Co.*, 754 F.Supp. 1070, 1075 (W.D.Pa.1991)).

B. The Objectors Have Standing Both to Attack the Propriety of Class Certification and to Attack the Proposed Settlement

34. The Court rejects Plaintiffs' argument that the objectors have no standing to attack class certification. Plaintiffs have argued in their Reply Memorandum in Support of Class Certification that this Court should be skeptical of the objectors' attacks on class certification.

Plaintiffs' Cert. Reply at pp. 1-3. Plaintiffs argue that the objectors, having had an opportunity to opt out and having chosen not to do so, cannot now oppose the existence of the class. *Id.* According to plaintiffs, upon receiving Class Notice, policyholders had two options: (1) they could opt out of the Class to pursue their individual claims, or (2) they could remain in the Class and accept or object only to the fairness and adequacy of the Proposed Settlement. *Id.* But, the Third Circuit has routinely allowed objectors to object to the propriety of class certification where a combined notice informed the policyholders of both the class action and the Proposed Settlement. *See, e.g., Georgine,* 83 F.3d at 622 (addressing objectors' concerns regarding class certification); *GM Trucks,* 55 F.3d at 804-05 (same).

35. In this case, the Court approved a combined notice, *i.e.,* to provide notice of the class action as required by Rule 23(c)(2) and to provide notice of the terms of settlement as required by Rule 23(e).[40] The purpose of class action notice is to allow a class member to choose whether to participate in the class action. Upon receiving Rule 23(b)(3) class action notice, a class member can opt out of the class if the class member prefers not to participate. *See* Rule 23(c)(2) ("the notice shall advise each

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[40] The Rule provides:

> Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

Fed.R.Civ.P. 23(e).

member that . . . the Court will exclude the member from the class if the member so requests").

36. Plaintiffs observe that after receiving class notice in the ordinary case, a would-be class member cannot refuse to opt out and later object to class certification. Plaintiffs argue that through declining to opt out, the class member has in essence consented to the propriety of class certification. Courts have held, for example, that a decision not to opt out of a class should foreclose attacks on whether the class has adequate representation. *See, e.g., Shore v. Parklane Hosiery Co., Inc.*, 606 F.2d 354, 357-58 (2d Cir.1979) (observing that right to opt-out of the proposed settlement protects class members' interests from alleged inadequate representation); *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1378 (9th Cir.1993) (holding that the failure to opt-out precluded challenge to adequate representation based upon purported conflicts of interest between subclasses), *cert. denied*, 512 U.S. 1220, 114 S.Ct. 2707, 129 L.Ed.2d 834 (1994).

37. The purpose of the notice of settlement is to allow a class member who has consented to class certification to object, if necessary, to any proposed settlement. *See* 2 *Newberg* § 11.55, at 11-132 ("Any party to the settlement proceeding has standing to object to the proposed settlement.").

38. While plaintiffs argue that the objectors have no standing to challenge, in addition to the settlement terms, the propriety of class certification, the Court disagrees. Following plaintiffs' logic, no class member would ever be able to challenge the propriety of class certification and the Court would be denied the advantage of access to

adverse perspectives. But, under *Georgine*, the Court must evaluate the propriety of class certification before contemplating the fairness of the settlement. Because the objectors' concerns may help crystallize issues affecting the propriety of class certification, the Court should consider these concerns in its class certification inquiry.

39. It seems counterintuitive that a class member who questions the propriety of class certification would desire to participate in the class action. It may even seem, as plaintiffs suggest, that the class member who does so is at best disingenuous.[41] Because the Court refuses to opine on the objectors' motives, and because it is theoretically possible that an objector may desire both to participate in the class and to challenge certification, the Court will permit the objectors to challenge the class certification elements.[42]

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[41] For example, it seems curious that Michael Malakoff, who represents plaintiffs Kittle and Krell, would opt Kittle out of class, but leave Krell in the class.

[42] Plaintiffs observe that the motives of objectors Krell and Beauvias in this action are suspect. Krell and Beauvias have participated in the class for the sole purpose of opposing the existence of the class and hypocritically contend that it would be impermissible to certify a nationwide class in this case, although counsel for both have sought to certify nationwide classes in other insurance sales practices litigation.

C. The Prudential Life Insurance Sales Practices Class Action Satisfies Federal Rules of Civil Procedure 23(a)[43] and 23(b)(3)[44]

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[43] Rule 23(a) provides in pertinent part:

> Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

[44] Rule 23(b)(3) provides:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b).

1. The Estimated Eight Million Policyholders Satisfy the Numerosity Requirement

40. The proposed class must be comprised of members that are so numerous that "joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1); *see In re ORFA Sec. Litig.*, 654 F.Supp. 1449, 1464 (D.N.J.1987). To meet the numerosity requirement, class representatives must demonstrate only that "common sense" suggests that it would be difficult or inconvenient to join all class members. *Lerch v. Citizens First Bancorp, Inc.*, 144 F.R.D. 247, 250 (D.N.J.1992). The Court may consider the geographical dispersion of class members. *Eisenberg*, 766 F.2d at 785-86 (holding numerosity requirement to be satisfied where putative securities fraud class consisted of "more than 90 geographically dispersed plaintiffs"). "To be sure, when the class is very large – for example, numbering in the hundreds – joinder will be impracticable; but in most cases, the number that will, in itself, satisfy the Rule 23(a)(1) prerequisite should be much lower." 1 *Newberg* § 3.05, at 3-25.

41. In this case, the numerosity requirement unquestionably is satisfied. Potential class members are dispersed throughout the United States and number in excess of eight million. Common sense suggests that it would be at best extremely inconvenient to join all class members. While Beauvias argues that this class is too large, super-numerosity is not inconsistent with requirements of Rule 23(a)(1). *See, e.g., General Tel. Co. of the N.W., Inc. v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 1706, 64 L.Ed.2d 319 (1980) (finding that the numerosity requirement is fact specific and proposes no absolute limitations). Rather, Beauvias' concern may implicate

"superiority" issues and the Court will discuss Beauvias' concern in that context.

2. Prudential's Orchestrated Sales Presentations, the Plaintiffs' Common Legal Theories, Prudential's Common Defenses, and Other Common Issues Undoubtedly Satisfy the Commonality and Predominance Requirements

42. In Rule 23(b)(3) class actions, courts often apply the Rule 23(a)(2) commonality requirement and the 23(b)(3) predominance tests together. 1 *Newberg* § 3.13, at 3-71. And the Third Circuit follows this approach. *See Georgine*, 83 F.3d at 626. For the class action device to be appropriate, there must be "questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). This requirement is satisfied "if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir.1994) (citation omitted). The commonality requirement is "easily met," because it is satisfied by the presence of a single common issue. 1 *Newberg* § 3.10, at 3-50 to 3-52 And for a class certified under Rule 23(b)(3), the Court must find that these common questions "predominate." To evaluate predominance, the Court must determine whether the efficiencies gained by class resolution of the common issues are outweighed by individual issues presented for adjudication. *See generally Newberg* § 4.25, at 4-81 to 4-86. The Third Circuit has observed that even a few common issues may satisfy the predominance requirement where the resolution of these issues greatly will advance the litigation:

> There may be cases in which class resolution of one issue or a small group of them will so advance the litigation that they may fairly be said to predominate. Resolution of common issues need not guarantee a conclusive finding on liability . . . nor is it a disqualification that damages must be assessed on an individual basis.

In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir.) (citations omitted), *cert. denied*, 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117, *and by*, 479 U.S. 915, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986).

43. Where many purchasers allegedly have been defrauded over time by similar misrepresentations, or by a common scheme to which alleged non-disclosures related, courts have found that the purchasers have a common interest in determining whether the defendant's course of conduct is actionable. *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir.1975) (gathering authority), *cert. denied*, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976); *Lerch*, 144 F.R.D. at 252 (finding predominance requirements satisfied where defendant's challenged activity was a common course of conduct); *In re Western Union Sec. Litig.*, 120 F.R.D. 629, 637 (D.N.J.1988) (same); *see also Seidman v. American Mobile Sys., Inc.*, 157 F.R.D. 354, 366 (E.D.Pa.1994) (finding plaintiffs' allegations of defendant's single, ongoing course of fraudulent behavior satisfied commonality and predominance requirements) *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 410 (D.N.J.1990) ("Where all class members are united in their desire to establish the defendants' complicity and liability, individual issues, if they exist, are secondary.") The Third Circuit has implicitly endorsed this approach in reversing the district court for denying certification in

Eisenberg. *See* 766 F.2d at 786 (declaring that the presence of individual questions does not preclude a finding that predominance requirements are satisfied).

44. Thus, courts frequently find allegations that the defendant engaged in a common course of conduct to satisfy the commonality and predominance requirements. *See, e.g., Seidman*, 157 F.R.D. at 360; *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 142 (D.N.J.1984) (finding requirements met where there were common questions whether corporation's financial statements and prospectus contained material misrepresentations or omissions) *Shankroff v. Advest, Inc.*, 112 F.R.D. 190, 193 (S.D.N.Y.1986) ("Since plaintiff's allegations focus on overall managerial decisions which affected all [of defendant's] clients, questions of oral representations or individual reliance do not overwhelm the issues common to the class."); 1 *Newberg* § 3.10, at 3-51 ("When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.").

45. Here, the commonality and predominance requirements are satisfied because not one, but many issues are common to all of the plaintiffs' claims. Miller Decl. at ¶¶ 12-13. All of plaintiffs' claims stem from Prudential's alleged common course of conduct. Particularly, all plaintiffs allege that Prudential encouraged or otherwise permitted fraudulent sales practices.[45]

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[45] Prudential's alleged intentional use of the fraudulent sales tactics provides the "single central issue" lacking in *Georgine*. 83 F.3d at 628. Unlike *Georgine*, where class members' claims varied widely and where a trial would necessarily focus

Although individual class members purchased their policies independently, Prudential allegedly induced them to do so through sales presentations containing standardized, coordinated, and uniformly deceptive sales representations and omissions.

a. Plaintiffs Must Establish Many Common Factual Issues to Establish Liability

46. It is readily apparent that class members will have to establish many of the same factual allegations to establish liability. Plaintiffs must establish, for example:

- Prudential's common course of conduct,
- Prudential's development of the sales presentations and materials, and artificial inflation and maintenance of dividend scales,
- Prudential's sale of replacement policies by material omission,
- Prudential's sale of vanishing premium policies by material omission,
- Prudential's sale of policies by misrepresenting the policies as investment or retirement plans,

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on individual issues, here, trial would focus on Prudential management's conduct. Trial would also focus on whether Prudential management refused to stop deceptive practices after being warned by senior management of the existence of these practices. Additionally, unlike *Georgine*, the Class is limited to purchasers of one type of product (life insurance policies) from one specific vendor (Prudential) through uniform sales techniques. And the class members are readily identifiable and have already suffered injury by the purchase of a product that was misrepresented.

•Prudential's failure to train or supervise agents,

•Prudential's unwillingness to prevent deceptive sales practices, and

•Prudential's scienter.

47. The MDL Panel recognized the predominance of common factual issues in its Transfer Order:

> The Panel finds that these twelve actions involve common questions of fact, and that centralization . . . will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Regardless of the nature of the plaintiff parties, all actions involve allegations that deceptive life insurance sales practices occurred or were encouraged as a[sic] result of some larger scheme or schemes organized by Prudential. Centralization . . . is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings . . . , and conserve the resources of the parties, their counsel and the judiciary.

August 3, 1995 Transfer Order at 1-2.

b. Plaintiffs Must Establish Many Common Legal Issues to Establish Liability

48. Class members will have to establish many of the same legal issues. These include, for example:

•whether policyholder reliance may be presumed by virtue of omissions or affirmative misrepresentations in Prudential's sales presentations,

•whether Prudential's offer to finance a policyholder's purchase of a policy constitutes an

enforceable financing contract distinct from the policy itself,

•whether Prudential breached the financing contract,

•whether Prudential breached an obligation of good faith and fair dealing implied in the policy contract or the financing contract,

•whether constructive trust principles apply to premium payments obtained by Prudential through deceptive sales presentation,

•whether compensatory damages of all claims asserted on behalf of class members can be objectively quantified on a classwide basis, and

•whether punitive damages should be imposed on Prudential.

c. Prudential's Affirmative Defenses Add Common Issues to this Class Action

49. In this case Prudential's affirmative defenses would satisfy, even without the commonality of plaintiffs' claims, the Rule 23 commonality requirement. And these defenses add to the predominance of common issues under Federal Rule of Civil Procedure 23(b)(3). Courts often have held that affirmative defenses raise common issues that are appropriately tried using the class action device. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 723 (E.D.N.Y.1983) ("Certification would be justified if only to prevent relitigating [affirmative] defenses over and over."), *aff'd*, 818 F.2d 145 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988).

50. In this case, Prudential asserts several defenses common to the claims of most plaintiffs. For example,

Prudential asserts strong statutes of limitation and laches defenses. Additionally, Prudential asserts that plaintiffs fail to establish reliance.

51. Furthermore, the determination of some of Prudential's affirmative defenses has become a very important common issue for the plaintiffs. In its motion to stay or dismiss the litigation under the doctrines of primary jurisdiction and abstention, Prudential asserted several defenses that are equally applicable to all class members. Prudential asserted that the Court should: (1) dismiss Plaintiffs' state law claims based on the doctrine of primary jurisdiction, (2) dismiss Plaintiffs' state law claims based on the Burford abstention doctrine, and (3) dismiss Plaintiffs' state law claims as mooted, precluded, or otherwise limited by the Task Force Plan. Because this Court denied Prudential's motion, all class members now share an interest in: (1) defending the Court's ruling against a motion for reconsideration or an appeal by Prudential, and (2) obtaining class certification so that this issue will become *res judicata* in favor of the class.

d. Prudential's Document Destruction Is an Extremely Pervasive Issue Common to Class Members

52. Prudential's persistent destruction of relevant documents also is a common issue weighing in favor of predominance. As documented in earlier orders of this Court, *see, e.g.*, January 6, 1997 and February 3, 1997 Orders, the appropriate remedy for document destruction is an extremely important common issue, which should be resolved in a single action to ensure an appropriate and uniform remedy.

e. Prudential's Fraudulent Concealment of Its Misrepresentations and Misdeeds Is an Issue Common to Class Members

53. Similarly, class plaintiffs' allegation that Prudential fraudulently concealed its misrepresentations and omissions creates a common issue fulfilling the commonality requirement. Courts often have found that a common issue of fraudulent concealment satisfies the commonality requirement. *See, e.g., Abramovitz v. Ahern*, 96 F.R.D. 208, 218 (D.Conn.1982). In *Abramovitz*, for example, the Court found the commonality requirement was satisfied, because, in part, the issue whether fraudulent concealment would toll the statute of limitations was common to all class members. *See id.* And in the current case, plaintiffs must establish (1) whether Prudential employed systematic affirmative steps following the sale of policies to conceal its wrongful conduct from plaintiff class members; and (2) whether Prudential permitted or failed to prevent the destruction of documents that would have been relevant to Plaintiffs' claims. These issues represent other common issues weighing in favor of the predominance finding.

f. The Agents' Use of Identical Oral Misrepresentations Weighs in Favor of the Finding of Predominance of Common Issues

54. In this case, Prudential agents' use of uniform oral misrepresentations based on Prudential training and uniform sales materials warrants a finding of predominance. Allegations of a common scheme of deception may indicate predominance, even where the scheme is implemented through oral misrepresentations by sales agents.

See, e.g., In re Am. Continental Corp./Lincoln Sav. & Loan Sec. Litig., 140 F.R.D. 425, 430-31 (D.Ariz.1992); *Davis v. Avco Corp.*, 371 F.Supp. 782, 792 (N.D.Ohio 1974) (certifying class claiming a pyramid investment scheme where plaintiffs alleged that defendants' agents made similar misrepresentations despite "individual variations" in the alleged misrepresentations); *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 427 (S.D.N.Y.1986) (certifying class where defendant's alleged wrongful conduct occurred at the management level and observing that "[e]ven proof of a material variance among the representations will not defeat the class if certain omissions, inferred from their absence in the [sales] literature, were common to all").

55. One indicator of a scheme of common deception is that the oral representations were substantially similar. *See Grainger v. State Sec. Life Ins. Co.*, 547 F.2d 303, 307-08 (5th Cir.1977), ("[T]he key concept in determining the propriety of class action treatment is the existence or nonexistence of material variations in the alleged misrepresentations."), *cert. denied*, 436 U.S. 932, 98 S.Ct. 2832, 56 L.Ed.2d 777 (1978); *see also Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669 (N.D.Ill.1989) (issue of what representations and disclosures were made could be a common one); *Shankroff*, 112 F.R.D. at 193 ("Since plaintiff's allegations focus on overall managerial decisions which affected all [defendant's] clients, questions of oral representations or individual reliance do not overwhelm the issues common to the class."); *McMahon Books, Inc. v. Willow Grove Assocs.*, 108 F.R.D. 32, 37-38 (E.D.Pa.1985) (observing that oral representations that appear similar or derived from the same "sales pitch" would support a predominance finding); *In re Am. Continental Corp.*, 140 F.R.D. at 430 ("Although the representations made to the

bond purchasers in this case were not identical, they were sufficiently uniform to warrant class treatment."); *contrast Martin v. Dahlberg, Inc.*, 156 F.R.D. 207, 216 (N.D.Cal.1994) (distinguishing factually *In re Am. Continental Corp., Heastie*, and *McMahon Books* and finding lack of predominance because no evidence of "even a somewhat standardized sales pitch").

56. Another indication of a common scheme to deceive is the existence of uniform written materials on which the oral representations were based. *See, e.g., Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 724-25 (11th Cir.1987) (observing that where oral communications are based on and consistent with, deceptive written materials, the fact that individual brokers provided information through oral communications does not preclude class certification), *cert. denied*, 485 U.S. 959, 108 S.Ct. 1220, 1221, 99 L.Ed.2d 421 (1988); *Sharp v. Coopers & Lybrand*, 70 F.R.D. 544, 548 (E.D.Pa.1976), *aff'd*, 649 F.2d 175 (3d Cir.1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648 (1982); *see also In re Home-Stake Prod. Co. Sec. Litig.*, 76 F.R.D. 351, 368-69 (N.D.Okla.1977); *Mulcahey v. Petrofunds, Inc.*, 79 F.R.D. 272, 279 (S.D.Tex.1978); *Shankroff*, 112 F.R.D. at 193; *contrast Martin*, 156 F.R.D. at 216 (finding no evidence of a "fixed set of written materials").

(1) Prudential Agents' Oral Misrepresentations Were Uniform Throughout the Country

57. In this case, the oral component of the fraudulent sales presentations did not vary appreciably among class members. Bernard Decl. at ¶ 23. Plaintiffs' allegations and the evidence presented to the Court demonstrate that throughout the country, Prudential agents

uniformly misled class members with virtually identical oral misrepresentations.

58. For example, policyholder complaints demonstrate that throughout the country Prudential uniformly misrepresented to class members that APP policy premiums would vanish and that existing policy values could be used to fund replacement policies without any additional out-of-pocket premium obligations. Task Force Report at 51-52. Also, Prudential audits revealed early in the Class Period that agents committed uniform, deceptive sales practices throughout the country. Second Am. Compl. at ¶¶ 79-88; Weiss Aff. at ¶¶ 71-74. In 1982 and 1983, for example, internal auditor John Cressman found rampant churning activities in various Prudential locations. Second Am. Compl. at ¶ 84; Weiss Aff. at ¶ 74. In response to these findings, Cressman created a system to detect churning. Second Am. Compl. at ¶ 85; Weiss Aff. at ¶ 74. When Prudential tested this system in other cities, the churning declined and sales plummeted – a strong indication of the prevalence of churning activity at these dispersed locations. Weiss Aff. at ¶ 74.

59. In addition to customer complaints and Prudential audits, many state regulatory investigations into Prudential's conduct indicate that Prudential's deceptive sales practices were uniform. The Task Force concluded that the fraudulent sales practices "were not isolated to any one region of the country." Task Force Report at 14. The Task Force found also that policyholder complaints regarding financed insurance and vanishing premium policies increased since 1990 in "every region" of the country. *Id.* at 223.

(2) To Create Consistent Oral Sales Presentations, Prudential Trained Its Agents and Provided Its Agents with Uniform Sales Materials

60. The agents' oral presentations were uniform because: (1) Prudential trained its agents uniformly; and (2) Prudential required its agents to use uniform sales materials.

61. First, Prudential extensively trained its agents to make uniform sales presentations. *See, e.g.*, Connecticut Report at 65 ("[T]here is evidence that sales managers taught new agents how to identify and use cash values and dividends to pay for new policies, misled policyholders during sales presentations, and even encouraged veteran agents to churn."); Pls. Evid. Sub., B-8 at 421 (Affidavit of Ronald H. Ward, June 27, 1995) ("I have in my possession training tapes, slides and sales materials in which The Prudential's executives and registered representatives made what I now believe to be misleading statements of material fact about features, returns and product identification."); *id.*, C-1 at 455 (Deposition Transcript of James C. Helfrich, August 16, 1996) (agent said "we were trained to do it this way"); *id.*, C-7 at 487 (Transcript of D. Rinsky, September 19, 1996) (discussing training processes); *id.*, H-1 at 808 (Memorandum by James C. Helfrich, November 18, 1992) ("Due to the way that agents were previously educated by management in the sale of insurance . . . , it appears that many, if not most, new agents were taught to sell insurance through financing mechanisms."). Prudential even provided its agents with scripts. *See, e.g.*, Pls. Evid. Sub., C-7 at 487-88 (Transcript of D. Rinsky, September 19, 1996) ("So the

scripts, questions and answers, detailed training materials and then repetition, certainly, is another important part of the training process."); C-8 at 500 (Transcript of E. Dare, September 18, 1996) ("[W]e have scripts for training new representatives on how to present different things."). A memorandum authored by James Helfrich, Prudential's Director of Consumer Affairs and Marketing Practices, warned senior Prudential management that Prudential agents were being taught to sell insurance through churning mechanisms and that agents were rewarded for their churning with high commissions:

> Due to the way that agents were previously educated by management in the sale of insurance (especially in areas such as Ohio), it appears that many, if not most, new agents were taught to sell insurance through financing mechanisms.
>
> * * *
>
> [F]luctuating dividend scales and complex use of loan values and the eventual impact of these financing transactions on insurance plans was mostly negative and not clearly understood by the consuming public. Consequently, as dividends decreased and as ill-conceived and miscalculated loan transactions started to cause many "financed" programs to fail or to not meet expectations, an attendant increase in complaints on all levels (regulatory, executive, home office, field, etc.) resulted.
>
> * * *
>
> In the past, the common response when agents were questioned as to why they used financed or abbreviated pay mechanisms for selling

> insurance has been: "That's the way we were trained." I think we have to admit that *this response is so common and consistent that, in fact, that was the primary, or only, way many of these agents were trained to sell insurance.* In all candor, it was an easy, appealing way to generate commissions. . . .

Pls. Evid. Sub., H-1 (emphasis added).

62. Second, Prudential's requirement that agents use pre-approved written marketing materials, which contained identical misrepresentations and omissions, further guaranteed the consistency of accompanying oral misrepresentations. Prudential specifically prohibited agents from using advertising or marketing materials that Prudential had not approved. Second Am. Compl. at ¶ 23; Pls. Evid. Sub., E-1 (document entitled "Approved PRUCO Materials"). Prudential required all sales presentations, policy illustrations, computer hardware and software used to generate sales materials, and other information used to sell insurance products to be pre-approved by Prudential. Second Am. Compl. at ¶ 22. Additionally, Prudential supplied its agents with pre-approved materials, including product brochures, pre-call letters, computer-based selling and illustrations systems, seminar materials, and newspaper advertisements. Second Am. Compl. at ¶ 22. And Prudential required standardized materials to market securities such as the VAL policies. Second Am. Compl. at ¶ 24; Pls. Evid. Sub., E-1 at 677 (Index of Pruco Direct Mail Letters and Ads, Including VAL Letters).

g. Plaintiffs' Claims that May Entail Establishing Reliance Do Not Undermine the Predominance of Common Issues

63. Some objectors have mistakenly argued that the need for individual plaintiffs to prove reliance for their fraud based claims undermines the predominance of common issues. The Court rejects the argument. Indeed, courts generally reject the argument that the issue of reliance undermines the predominance of common issues because reliance is an issue secondary to establishing the fact of the defendant's liability: "Challenges based on . . . reliance have usually been rejected and will not bar predominance satisfaction because [reliance pertains] to the right of a Class Member to recover in contrast to underlying common issues of the defendant's liability." 1 *Newberg* § 4.26, at 4-104. Where all class members must establish the defendant's complicity and liability, thus, the individual issues are secondary and the class should be certified. *See In re IGI Sec. Litig.*, 122 F.R.D. at 460. Even if many of the plaintiffs' claims involved a reliance element, thus, common issues would predominate.

64. But in this case most of the plaintiffs' claims do not even involve a reliance element. Plaintiffs' claims for breach of contract, breach of implied obligation of good faith and fair dealing, negligence, negligent training and supervision, and unjust enrichment do not involve reliance. An individual issue with respect to one element of a small portion of plaintiffs' claims does not outweigh the multitude of issues common to the remaining elements and claims.

65. And plaintiffs' fraud-based claims stem largely from misleading omissions, Second Am. Compl. at ¶¶ 43, 58-59, for which reliance may generally be presumed. For example, under the Securities Exchange Act section 10(b), individual reliance is presumed if the defendant's omission is material. *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-54, 92 S.Ct. 1456, 1471-72, 31 L.Ed.2d 741 (1972) [hereinafter *Ute Citizens*] (holding that reliance on a material omission may be presumed in a Rule 10b-5 case); *see also, e.g., Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 924 (3d Cir.1992) (holding that plaintiffs were entitled to the *Ute Citizens* presumption of reliance); *Sharp*, 70 F.R.D. at 547 ("One of the two exceptions to the reliance requirement arises when the defendant fails to disclose material facts which it has a duty to disclose (nondisclosure)."); *In re LILCO Sec. Litig.*, 111 F.R.D. 663, 668-69 (E.D.N.Y.1986) ("With respect to federal securities claims under § 10(b) and Rule 10b-5, issues of individual reliance are largely irrelevant [to class certification] because reliance is presumed if the statement or omission is material."); *In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig.*, 122 F.R.D. 251, 254-55 (C.D.Cal.1988) (holding that *Ute Citizens* applied to permit certification of hybrid misrepresentation/omission claims because the court could not predict which theory would prevail before resolution of merits). In addition, reliance may be presumed for fraud-based common law claims when the alleged omissions and misrepresentations are uniform and material and the class members acted in a manner consistent with reliance. *See, e.g., Vasquez v. Superior Ct. of San Joaquin County*, 4 Cal.3d 800, 94 Cal.Rptr. 796, 804-05, 484 P.2d 964, 972-73 (1971)

(holding that where material misrepresentations are made to class members an inference of reliance arises to the entire class). Accordingly, because reliance is an element only in some of plaintiffs' claims, and because reliance may be presumed, reliance does not undermine the predominance of common issues.

h. Individual Damages Do Not Undermine the Predominance of Common Issues

66. Individual damages issues do not defeat an otherwise valid class certification attempt. *See Baby Neal*, 43 F.3d at 57 (finding that individual damage determinations did not undermine commonality finding); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir.1977) ("[I]t has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when common issues which determine liability predominate."), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978); *Gunter*, 164 F.R.D. at 399; *Walsh v. Pittsburgh*, 160 F.R.D. at 531 (finding predominance met where issue of individual damages was "largely a matter of mathematical calculation").

67. In this case, the Court would employ one of several methodologies to allow the parties to present classwide damages evidence at trial.[46] Pls. Certif. Memo,

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[46] The Third Circuit has held that when there is sufficient evidence of the fact of damage presented at trial, proof of the amount of damages to a mathematical certainty is unnecessary and an intelligent estimate of damages is acceptable. *See Rochez Bros., Inc. v. Rhoades*, 527 F.2d 891, 895 (3d Cir.1975) ("Although

Case Management App. at 16-24. One approach would be to present expert testimony estimating the aggregate amount of damages sustained by the class. *See In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 351-54 (E.D.Pa.1976) ("*Sugar Indus.*"). Another approach would be to allow the jury to determine, with the assistance of expert testimony, a formula that would later be applied to individual class members to compute damages during the claims allocation process. *Id.* Thus, there are many available means to address individual damages that would allow the Court to adjudicate fairly and efficiently the many issues common to the plaintiffs while allowing a fair resolution also of the individual damages issues.

i. Objectors' Arguments that Common Issues Do Not Predominate Are Unpersuasive

68. Beauvias incorrectly argues that the predominance of common issues is refuted by Prudential's contention that a global inference of improper sales practices is improper and insistence that any claim must be assessed individually. Prudential claims, for example, that "incidents of improper activity likely constituted only a fraction of the financed and APP sales discussed in the Report." Prudential's Response to Report of the Multi-State Life Insurance Task Force and Multi-State

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the law does not command mathematical preciseness from the evidence in finding damages, sufficient facts must be introduced so that a court can arrive at an intelligent estimate without speculation or conjecture."), *cert. denied*, 425 U.S. 993, 96 S.Ct. 2205, 48 L.Ed.2d 817 (1976).

Market Conduct Examination in Pru. App., Vol. II, Ex. 6. Prudential's interpretations of the issues in this class action do not, however, control; Prudential may be incorrect and plaintiffs may be entitled to various presumptions of reliance. Additionally, however, the logically prior issue whether a presumption should apply is itself a common issue.

69. Krell argues that common questions cannot predominate for those injured by "other improper sales practices" because the Court cannot discern what common and individual questions would be for these class members. Krell's argument is creative, but unpersuasive. Plaintiffs have alleged that Prudential defrauded customers through systematically deceptive sales practices. The "other improper sales practices" clearly involve the same issues – Prudential's intent and knowledge, for example.

j. Common Issues Overwhelmingly Predominate the Individual Issues in this Case

70. The Court finds that Rule 23's commonality and predominance requirements are satisfied because the plaintiffs' allegations and evidentiary submissions establish the multiplicity of common issues discussed above and that these common issues dramatically outweigh the potential individual issues, also discussed above.

3. The Plaintiff Representatives' Claims Are Typical of Those of the Other Class Members

71. Rule 23 requires also that the named plaintiffs' claims be typical of those of the class at large. In the words of the Supreme Court: "[t]he typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiffs' claims." *General Tel. Co.*, 446 U.S. at 330, 100 S.Ct. at 1706. The typicality inquiry assesses whether the action can be efficiently maintained as a class action and whether the named plaintiffs have incentives aligned with those of absent class members to ensure that the absentees' interests are protected. *See Baby Neal*, 43 F.3d at 57-58; *Eisenberg*, 766 F.2d at 786; *Weiss v. York Hosp.*, 745 F.2d 786, 809-10 n. 36 (3d Cir.1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). The plaintiff with claims typical of the class benefits the class by pursuing self-interest: "[A] plaintiff with typical claims will pursue his or her own self-interest in the litigation and in so doing will advance the interests of the class members, which are aligned with those of the representative." 1 *Newberg* § 3.13, at 3-75. The named plaintiffs' claims should not be "markedly different" from those of the class. *See Baby Neal*, 43 F.3d at 57.

72. Typicality lies where there is a strong similarity of legal theories, *see id.* at 58, or where the claims of the class representatives and the class members arise from the same alleged course of conduct by the defendant, *see Eisenberg*, 766 F.2d at 786; *Walsh v. Pittsburgh*, 160 F.R.D. at 530; *Gunter*, 164 F.R.D. at 395-96; *In re Western Union Sec. Litig.*, 120 F.R.D. at 634. Wrongful conduct that aggrieves both the named plaintiffs and the putative class members

is sufficient to satisfy the typicality requirement despite varying fact patterns underlying the individual claims. *See Baby Neal*, 43 F.3d at 58 ("Indeed, even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories."); *see also In re IGI Sec. Litig.*, 122 F.R.D. at 456 ("[I]t is defendants' course of conduct, in this case the release to the press of the allegedly fraudulent and misleading statements, upon which the court must focus in determining typicality."). Under these circumstances, factual differences do not preclude a typicality finding. *See, e.g., Eisenberg*, 766 F.2d at 786.

73. In this case, typicality is clearly fulfilled. All of the named plaintiffs allege that Prudential maintained a scheme to defraud policyholders. Specifically, plaintiff Nicholson asserts churning, vanishing premium, and investment plan claims; plaintiff Dorfner asserts churning and vanishing premium claims; plaintiffs Kuchases assert churning and investment plan claims; and plaintiff Gassman asserts vanishing premium and investment plan claims. The absent class members purportedly were subjected to the same scheme and deceptive sales practices as these representatives. And because there is a prominent guiding thread through all of the plaintiffs' claims – prudential's scheme to defraud – this action can be efficiently maintained as a class action and the class representatives will adequately protect the interest of absentees.

74. Krell wrongfully alleges that the class fails for lack of typicality because no class representative claims to have been injured by "other improper sales practices."

The Supreme Court has set forth factors that class plaintiffs must demonstrate to show that their claims are typical of a broader set of claims alleged. *See General Tel. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). The named plaintiff must be part of the class, possess the same interest as the other class members, and suffer the same injury as other class members. *See id.* at 156, 102 S.Ct. at 2369-70. Where the named plaintiff alleges multiple claims on behalf of the class, that plaintiff must possess the same injury and suffer the same generic type of harm as other class members. *See id.* at 159, 102 S.Ct. at 2371. The injury need not necessarily arise from identical factual circumstances that gave rise to the injuries of class members. *See Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 131 (3d Cir.1987) (holding typicality satisfied where named plaintiffs did not share all of the claims of the class but the claims alleged appeared to stem from a single course of conduct by which the defendant failed to represent its members fairly and effectively), *cert. denied*, 484 U.S. 1042, 108 S.Ct. 773, 98 L.Ed.2d 860 (1988). In the instant case, class members injured by "other fraudulent sales practices" have suffered the same injury – they are victims of Prudential's deception – and have suffered the same generic type of harm – they have economic damages – as the named plaintiffs. The fact that the Proposed Settlement covers claims concerning "other fraudulent sales practices" occurring during the Class Period where no class representative claims to be injured by "other fraudulent sales practices" does not undermine typicality.

4. Class Counsel and the Class Representatives Adequately Represent the Class

75. Rule 23(a) requires, lastly, adequacy of representation: "the representative parties [must] fairly and adequately protect the interests of the class." There are two factors: (1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (2) the plaintiff must not have interests antagonistic to those of the class. *See Hoxworth*, 980 F.2d at 923 (citations omitted); *see also In re Western Union Sec. Litig.*, 120 F.R.D. at 635. The party challenging representation bears the burden to prove that representation is not adequate. *See Walsh v. Pittsburgh*, 160 F.R.D. at 530; *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. at 140.

a. Class Counsel Adequately Represent the Class

76. The vigorous prosecution requirement ordinarily equates to the competence and experience of Class Counsel. *Grasty*, 828 F.2d at 129 (" 'vigorous prosecution' must be measured in terms of the efficiency and legal acuity of the class representative rather than the number or length of papers filed."). In the context of proceedings to certify a class for settlement purposes only, the Third Circuit has observed that the terms of a proposed settlement may demonstrate whether representation by counsel is adequate. *See Georgine*, 83 F.3d at 630 (finding that class conflict prevented finding of adequate representation and observing that settlement demonstrated class conflict because settlement made recovery determinations on which class member interests were at odds).

(1) Class Counsel Are Extremely Qualified

77. In this case, there is no doubt that Class Counsel have prosecuted the interests of the class members with the utmost vigor and expertise. Plaintiffs' team of legal counsel is comprised of preeminent class action attorneys from throughout the country, many of whom have been qualified as lead counsel in other nationwide class actions. Weiss Aff. at ¶ 252; *New York Life*, 1995 N.Y. Misc. LEXIS 652, at *28; *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 208 (S.D.N.Y.1995). Indeed, Plaintiffs' Counsel have a long and successful track record in litigating and trying major class action cases. Weiss Aff. at ¶ 254.

(2) Class Counsel Also Are Extremely Committed to the Class and All Class Members and Are Unhampered By Any Conflicts of Interest or Separate Inventories of Cases

78. Counsel who have separate inventories of cases, may compromise class representation. *See Georgine*, 83 F.3d at 622. In this case Class Counsel have no inventories of cases outside the current action and have the fullest commitment to ensuring that class members receive the maximum benefits available.

79. Also, counsel who negotiate their fee arrangements while continuing to negotiate for class relief may not adequately represent the class because of their pecuniary interest in obtaining a large fee. *See GM Trucks*, 55

F.3d at 801 ("[E]ven honorable counsel – like Class Counsel here – may be compromised by the possibility of a large fee."). In this case, this Court did not authorize Class Counsel's fee negotiations until after all provisions in the Settlement Agreement were complete and Class Counsel and Prudential did not commence any fee negotiations until after this Court authorized them. Class Counsel's fee agreement with Prudential, thus, did not compromise Counsel's ability to negotiate relief on behalf of the class.

80. Krell argues that Class Counsel abandoned crucial discovery when the fee was being negotiated, raising serious "red flags" about the Proposed Settlement and the adequacy of lead counsel. Krell Brief at 65. Krell attempts to divert the Court with a red herring. Discovery in this case was extremely substantial, and Class Counsel negotiated as if Prudential's conduct were the worst imagined.

(3) The Value of the Proposed Settlement to All Class Members Demonstrates that Class Counsel's Representation Is Adequate

81. In this litigation, Class Counsel have demonstrated their skills in developing the monumental settlement currently proposed. Foremost, Class Counsel helped first to achieve the Task Force Remediation Plan, and later achieved the enhancements that form the present Settlement Agreement between Prudential and the Class. Weiss Aff. at ¶¶ 23-27, 117-29. Then, upon discovering evidence of widespread document destruction,

Class Counsel investigated the document destruction and negotiated additional class benefits in light of the document destruction episodes. January 6, 1997 and February 3, 1997 Orders. Class Counsel avidly have promoted the plaintiffs' interests and have thereby afforded the class highly satisfactory significant material benefits.

(4) Class Counsel Vigorously Have Represented the Class Throughout These Proceedings

82. Moreover, even without the substantive achievements of the Proposed Settlement, Class Counsel have shined throughout these proceedings. Class Counsel adroitly represented class members when counsel briefed and argued plaintiffs' interests in a host of pretrial motions: motions to dismiss, motions to stay the proceedings, a motion to abstain, and motions to stay discovery. Weiss Aff. at ¶¶ 52-59. Even after the Court stayed formal discovery at Prudential's request, Plaintiffs' Counsel undertook an intensive private investigation and informal discovery, developing, with this Court's approval, a method to interview former Prudential agents. *Id.* at ¶¶ 60-64. And, once this Court lifted the stay, Plaintiffs' Counsel conducted massive document discovery and depositions. *Id.* at ¶¶ 85-100. Counsel for plaintiffs have, thus far, reviewed over one million pages of documents, 160 computer disks, and 500 videotapes and audio tapes, and have conducted numerous depositions and interviews of Prudential witnesses. *Id.* at ¶¶ 85-97.

83. Krell criticizes the fact that Class Counsel valued speed in resolving this case. But a swift resolution of

this case is important to afford policyholders, many of whom are ill or elderly, meaningful relief. And speed did not jeopardize class relief. Plaintiffs' counsel engaged in extremely adversarial pretrial motion practice and voluminous discovery. Class representation has not been compromised by Class Counsel's sound and swift effort to resolve plaintiffs' claims.

b. The Plaintiff Representatives Adequately Represent the Class

84. Class certification requires also that the class representatives represent adequately the interests of the class. Although it is not necessary for the putative class representatives' claims to be identical to those of absent class members, due process precludes certification if the named plaintiffs possess potentially conflicting interests that may impair the vigorous prosecution of the class claims. *In re Baldwin-United Corp. Litig.*, 122 F.R.D. at 428. Where class members have conflicting interests, each group must receive its own representation; it is not sufficient that the named representatives' claims are representative of other class members. *See Georgine*, 83 F.3d at 631 ("presently injured class representatives cannot adequately represent the future plaintiffs' interests and vice versa"); *GM Trucks* 55 F.2d at 801 ("[W]e must be concerned that the individual owners had no incentive to maximize the recovery of the government entities; they could skew the terms of the settlement to their own benefit."); contrast *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 109-110 (3d Cir.1979) (possible disagreement among class members as to appropriate relief is no bar to certification at the liability stage), *rev'd on*

other grounds, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981); *Link v. Mercedes-Benz*, 788 F.2d 918, 929 (3d Cir.1986) (holding in suit against manufacturers and dealers for price fixing or repairs that fact that class members obtained repairs from different dealerships did not create antagonism to preclude finding of adequate representation).

85. In this case, the named plaintiffs unquestionably well represent the class. The named policyholders who were defrauded share the same incentive as absent policyholders who were defrauded to establish the alleged fraud and to maximize the overall recovery. Weiss Aff. at ¶ 252; *see also Weiss v. York Hosp.*, 745 F.2d at 811; *New York Life*, 1995 N.Y. Misc. LEXIS 652, at * 29 (holding representation adequate where policyholders represented mix of characteristics representative of the mix found in the class itself). And, there are no disparate interests to impair plaintiffs' incentive to prosecute fully all aspects of their claims against Prudential. All plaintiffs have an interest in establishing Prudential's knowledge and orchestration of the scheme to defraud life insurance consumers. All plaintiffs share an interest in obtaining relief commensurate with individual injury and in securing a punitive damages claim against Prudential. Against this backdrop, individual factual variations between plaintiffs' claims do not divide the class.

86. Also, the Proposed Settlement confirms that class representatives provide adequate representation to absent class members and that there are no conflicts between class members. Under the Proposed Settlement, each claimant may obtain relief based on whether the available evidence demonstrates that he or she was

injured. Additionally, relief is uncapped, allowing all class members to be compensated for their losses without the risk that some victims will deplete the defendant's funds at the expense of other victims.

87. Some objectors have argued that policyholders who acquired their policies on different dates are antagonistic toward each other. Differences in the dates that a policy was acquired are irrelevant, however. *See In re Baldwin-United Corp. Litig.*, 122 F.R.D. at 428. In *In re Baldwin*, for example, the court rejected the argument that plaintiffs who purchased early in the Class Period had no incentive to prove the facts relevant to a purported fraud committed on a subsequent purchaser. *See id.* ("All class members stand or fall on the issue whether material information was misrepresented or withheld from [product] purchasers, and the Court believes that the named plaintiffs will pursue this issue vigorously.") The facts surrounding Prudential's sales practices employed early in the Class Period are similar to those surrounding later sales practices. Additionally, the primacy of the issue of Prudential's scheme to defraud dwarfs any potential differences between class members created by timing. Consequently, there is no class antagonism based on policy purchase date differences.

88. Some objectors have argued that there is intra-class antagonism because of a conflict between presently injured plaintiffs and "futures claimants," as was a problem affecting class certification in *Georgine*. Krell, citing *Georgine*, argues also that "other sales practices" claimants may have valuable future claims, concerning their existing contracts, that will be forever released in this Proposed Settlement and that class representatives cannot

re [sic] resent these class members. Krell's argument is without merit. All class members including those with "other sales practices" claims are presently injured. If any misrepresentation or fraud occurred in the sale of a life insurance policy to a class member during the Class Period, the resultant injury now exists. Even if a policyholder was not aware prior to receiving the Class Notice that he or she had been injured, the policyholder now knows about his or her injuries by virtue of the Class Notice. Additionally, Prudential is creating an "800" number to provide the policy information necessary to enable a policyholder to determine the extent of any injury due to fraudulent sales practices that occurred during the Class Period.[47] Thus, all class members are injured now, if at all, and there are no "futures claimants."

89. According to Krell, there is a conflict also between replacement policyholders and non-replacement policyholders. Krell states that Lead Counsel traded the "very substantial claims of the replacement policyholders to obtain additional relief for the other class members." Krell Brief at 6. Krell explains that Class Counsel traded valuable replacement claims for the financial guarantees.

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[47] The Stipulation Amendment provides that the Stipulation of Settlement, Exhibit C, ¶ II.D.4 is amended to require that relevant information be provided to class members to allow them to assess their injuries. Prudential must: "[p]rovide Claimants who so request with current information with respect to the existence of any outstanding loans, their most recent dividend payments, their dividend status, and, where applicable, their currently illustrated year of abbreviation." Stipulation Amendment ¶ 5.

Krell bases his argument on the incorrect assumption that illegal replacements are easily demonstrated by the policyholder's underwriting file at Prudential, while vanishing premium and investment claims are based on potentially conflicting oral testimony of policyholders and agents. *id.*

90. The Court disagrees with Krell's assertion that there is a conflict between replacement and non-replacement policyholders. First, the claims of replacement policyholders are not stronger than non-replacement claims. There will often be significant documentation to support both vanishing premium sales and investment plan sales. For example, vanishing premium sales often were accompanied by fraudulent illustrations and investment plan sales were accompanied by sales material that failed to disclose that the product offered was life insurance. Second, the Proposed Settlement treats all claims equally. Any policyholder, regardless of the fraudulent sales practice alleged, is entitled to full compensatory relief if the policyholder demonstrates a right to relief. Class Counsel did not allocate relief to some plaintiffs while denying relief to others. Thus, Krell's allegation that the Proposed Settlement compromises replacement policyholder rights for the benefit of other claimants proves untrue.

5. The Class Action Device Is Superior to Any Other Means to Adjudicate this Controversy

91. The final class certification factor that must be discussed, Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." The Rule provides

four non-exclusive factors to aid the Court in a superiority determination: (1) the interest of individual members of the class in individually controlling the prosecution of the action; (2) the extent of litigation commenced elsewhere by class members; (3) the desirability of concentrating claims in a given forum; and (4) the management difficulties likely to be encountered in pursuing the class action. In this case, considering these and other factors, the class action is not only the superior method for adjudicating this controversy, it affords the vast majority of class members the only practical avenue of redress.

a. There Are No Other Sensible Means to Adjudicate this Controversy

92. Before reaching Rule 23(b)(3)'s enumerated factors, the Court observes that Rule 23(b)(3)'s superiority requirement compares class actions to other available methods to adjudicate the controversy. When the claims of class members are small, denial of class certification would effectively deprive these class members of judicial redress, a strong indication that the class action is the superior means of adjudication:

> For that segment of the class with small individual claims, the costs of litigation and lack of notice would mean that small or unsophisticated claimants would go unprotected. It must be remembered that Rule 23(b)(3)'s superiority requirement expressly compares class actions "to other *available* methods for the fair and efficient adjudication of the *controversy*." . . . When the claims of the class members are small, denial

> of a class action would effectively exclude them from judicial redress.

1 *Newberg* § 4.27, at 4-107 to 4-109 (emphasis in original). The class action device may allow plaintiffs "to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co.*, 472 U.S. at 809, 105 S.Ct. at 2973; *see MacNeal v. Columbine Exploration Corp.*, 123 F.R.D. 181, 187-88 (E.D.Pa.1988) (holding that class action was superior to individual suits where class members had relatively small interests and might not have the wherewithal to bring suit to protect their individual rights).

93. Additionally, as a class increases in size, there become fewer methods to adjudicate the controversy. As the case becomes larger and more geographically dispersed, the traditional alternatives of joinder, consolidation, and intervention will be impracticable. *See* 1 *Newberg* § 4.33, at 4-136 to 4-137.

94. In this case, most class members' individual compensatory damages claims are relatively modest, leaving individual class members with little ability to litigate their claims against Prudential independently. Weiss Aff. at ¶ 261. The majority of class members in this case own relatively modest life insurance policies with death benefits averaging $35,000. *Id.* Also, the class includes over eight million members from throughout the country, making joinder, consolidation, and intervention impracticable. Consequently, there appear to be no other available means to adjudicate this controversy and the class action device appears the only rational avenue of redress for many class members.

b. Individual Plaintiffs Have Little Interest in Controlling the Prosecution of Separate Actions

95. Rule 23(b)(3) indicates that the first factor is "the interest of members of the class in individually controlling the prosecution or defense of separate actions." The test is whether the interest of most class members in conducting separate lawsuits is so strong as to require denial of class certification. *See, e.g., McClendon v. Continental Group, Inc.*, 113 F.R.D. 39, 45 (D.N.J.1986) (holding class action to be superior adjudication method where individual class members had no interest in controlling prosecution of individual actions).

96. Here, class members have little incentive or ability to prosecute their claims against Prudential individually. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1779, at 557 (1986) (observing that "a group composed of consumers or small investors typically will be unable to pursue their claims on an individual basis because the cost of doing so exceeds any recovery they might secure"); *Sala v. National R.R. Passenger Corp.*, 120 F.R.D. 494, 500 (E.D.Pa.1988); *Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc.*, 120 F.R.D. 642, 648 (E.D.Pa.1988) (holding that class action was superior to alternatives where many individuals were injured, but no one person may have been damaged to the degree requisite to institute independent litigation). The class is estimated to encompass millions of Prudential policyholders located throughout the United States. Because Prudential markets to middle-income consumers, most class members cannot afford to pursue individual litigation. Weiss Aff. at ¶ 261. The average death

benefit payable on a class member owned insurance policy totals $35,000. *id.* Thus, compensatory damages suffered by a typical class member are insubstantial, and it is unlikely that many class members would be able to locate attorneys to litigate their individual claims for a contingent-fee. *id.*

97. Also, the proportionately small number of policyholder suits now pending against Prudential confirms that class members lack a compelling interest individually to control the prosecution of separate actions. *See, e.g., Bentkowski v. Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401, 405 n. 10 (E.D.Pa.1976) (observing that "dearth" of other suits suggested lack of interest in individual control). As of recently, there were approximately 200 separate policyholder suits pending against Prudential nationally. Miller Decl. at ¶ 14. In relation to the total population of class members, these action [sic] represent less than six one-thousandths of one percent of all class members.

98. And, although the number of individual actions pending against Prudential, approximately 200, indicates little incentive to individually litigate when measured against the over eight million class members, the individual actions are numerous enough in absolute terms to serve as a significant strain on the judicial system. *Id.* These factors weigh heavily in favor of granting class certification.

c. The Number of Actions Pending Elsewhere Weighs in Favor of Finding the Class Action Mechanism Superior

99. Rule 23(b)(3) indicates as the second factor "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." The existence of other actions may indicate either that there are other methods to adjudicate the controversy or that class certification is superior:

> [T]he existence of other suits by class members may suggest an interest in individual litigation. On the other hand, the existence of other suits may indicate that a class action is needed. Class actions are intended in part to eliminate the waste of judicial resources caused by duplicative individual actions. A class action will ordinarily be superior to repetitive individual suits.

1 *Newberg* § 4.30, at 4-121; *see, e.g., Shamberg v. Ahlstrom*, 111 F.R.D. 689, 699 (D.N.J.1986) (holding that class action was superior to other methods of adjudication, including multiplicity of duplicative individual lawsuits).

100. Here, the existence of other actions weighs in favor of certifying the class. First, the number of individual actions is inconsequential in light of the number of potential class members. *See McClendon*, 113 F.R.D. at 45. This suggests little individual interest in prosecuting actions against Prudential. Second, the sheer number of actions, although proportionally few, indicates that a class action is necessary to eliminate the waste of judicial resources caused by duplicative individual actions. Third, the individual actions will not adjudicate the controversy that underlies this class action litigation; rather, each

would only resolve the individual claims of a minute portion of the class.

d. To Concentrate this Litigation in New Jersey Is Desirable

101. Rule 23(b)(3) indicates that the third factor to be considered in assessing whether the class action device is superior to other means of adjudication is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." The factor emphasizes the desirability of the forum selected, not the desirability of claims concentration generally. *See* 1 *Newberg* § 4.31, at 4-123; *Bentkowski*, 70 F.R.D. at 405 (holding that when majority of class lived in New Jersey, Maryland, Pennsylvania, and Virginia, the Eastern District of Pennsylvania was a desirable forum).

102. In this case, plaintiffs' claims are appropriately concentrated in New Jersey. Prudential's principal place of business is in New Jersey and most potential upper echelon managerial witnesses are located in New Jersey. As the MDL Panel observed, plaintiffs' allegation of Prudential's common scheme, in particular, indicates that the District of New Jersey is the most appropriate forum for this litigation:

> Particularly in light of plaintiffs' allegations of company-wide schemes (supposedly emanating from these headquarters), significant discovery of Prudential documents and employees is likely to occur there. We also note that the New Jersey forum is not just the choice of New Jersey litigants. Plaintiffs in several other of the constituent actions state that they support or do not

> oppose centralization in the District of New Jersey.

August 3, 1995 Transfer Order at 2. Indeed, there is no more appropriate forum for this controversy.

e. Although Managing this Case Will Be Challenging, No Anticipated Difficulties Render this Action Unmanageable

103. Rule 23(b)(3) indicates last that the Court should consider "the difficulties likely to be encountered in the management of a class action" to determine whether the class action mechanism is superior to other means of adjudicating the case. Manageability "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

104. The Court must query not whether there will be any manageability problems, but whether reasonably foreseeable difficulties render some other method of adjudication superior to class certification. *See* 1 *Newberg* § 4.3, at 4-125 ("It is only when such difficulties make a class action less fair and efficient than some other method, such as individual interventions or consolidation of individual lawsuits, that a class action is improper."). When courts and counsel work together to manage increasingly complex and large-scale litigation, "[e]xperience . . . shows that visions of unmanageability soon disappear." *Sugar Indus.*, 73 F.R.D. at 357. Moreover, most courts hold that manageability difficulties cannot support

denial of class certification when no other practical litigation alternative exists. *See, e.g., Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 49 (E.D.Va.1981) (certifying class where common questions predominated and there was no other effective way to try the case); *see also* 1 *Newberg* § 4.32, at 4-130 to 4-131 ("As has been noted with the predominance test, Rule 23(b)(3) permits a class denial for lack of superiority only when other available methods for the fair and efficient adjudication of the controversy actually exist.").

105. Indeed, the successful resolution through trial of extremely large and complex classes bodes well for the manageability of even the biggest and most complex actions:

> Cases that have certified large classes illustrate the size and complexity of classes that have been upheld. Decisions denying classes under similar circumstances should be of limited value as precedent, because they are based on speculation at the outset of the suit that the action will prove unmanageable, while the cases cited show otherwise.

1 *Newberg* § 4.33, at 4-139.

106. Here, the Court has carefully considered the choice of law issues that confront the Court and concludes that these choice of law issues do not render this class action unmanageable. Plaintiffs have demonstrated, consistent with the approach endorsed in *Asbestos School* and cited with approval in *Georgine*, that any state-by-state variations in the governing legal standards are manageable. Issacharoff Decl.; Issacharoff Decl., Apps. B & C. Plaintiffs have submitted a series of charts setting forth

comprehensive analyses of the various states' laws potentially applicable to their common law claims for fraud, breach of contract, implied obligations of good faith and fair dealing, negligence, and negligent misrepresentation. Issacharoff Decl., App. B. These charts compare state-by-state the elements of the claims alleged in the Second Amended Complaint with citations to the pertinent authorities in each of the fifty states – the same approach used in the *Asbestos School* litigation. The elements of these common law claims are substantially similar and any differences fall into a limited number of predictable patterns. Issacharoff Decl. at ¶ 22 ("[A]ny variations among legal standards [of the state laws] are neither particularly great nor insuperable to the certification of a litigation class. To the extent that such variations exist, they could be readily handled by instructions and structured questions to the jury and, if necessary, appropriate subclasses."). Thus, plaintiffs' claims can be grouped into a manageable number of categories accommodating any variations in the elements of the potentially applicable states' laws.[48] And, the Court finds that a manageable number of jury instructions could be fashioned to comport with the elements of the common law claims in the many jurisdictions.[49]

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[48] A court certifying a class for claims very similar to those at bar – a nationwide class of vanishing premium policyholders alleging claims for fraud, negligence, gross negligence, and statutory fraud – used a similar approach. *See Justice v. Great West Life Assurance Co.*, No. 94-3155 (Tex.Dist.Ct. Aug. 1, 1995).

[49] Plaintiffs have submitted sample jury instructions and special verdict forms to illustrate that variations among potentially applicable state laws can be managed to permit a fair

107. Additionally, the Court finds that any difficulties that may arise during the discovery, pre-trial, or trial stage of this litigation may be effectively managed through traditional procedural techniques such as special interrogatories, special verdict forms, sub-classes, or sequenced trial phases. *See GM Trucks*, 55 F.3d at 815; *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 83 (D.Md.1991). The record establishes that plaintiffs can offer classwide proof of liability and damages:

> [Plaintiffs'] allegations, by themselves, place this litigation well within the ambit of a certifiable Rule 23(b)(3) class, because they clearly allege both the existence and predominance of common issues and demonstrate the superiority of aggregate adjudication. . . . [P]laintiffs have made a record that they can offer classwide evidence with respect to both liability and damages. That showing further confirms predominance of common issues and the manageability of the case through the remainder of the pretrial and trial phases.

Miller Decl. at ¶ 13.

108. In sum, with effective case management this class action will obtain the benefits of efficiency and fairness, the Court finds that the superiority requirement is met.[50]

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and efficient adjudication by the fact finder at trial. Issacharoff Decl., App. C.

[50] This case is of a different species than *Georgine*, where the Third Circuit observed that a class of a certain "magnitude" might not be appropriate for certification. *See Georgine*, 83 F.3d at 634.

V. The Class Notice and Supplemental Materials Fulfill the Notice Requirements of Federal Rules of Civil Procedure 23(c)(2) and 23(e)

109. The Class Notice was adequate, comprehensive, and timely. Notice here was a combined notice to inform class members both of the existence of a class action, as required by Rule 23(c)(2),[51] and the substance

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In *Georgine*, the class sought to settle claims of between 250,000 and 2,000,000 individuals who were exposed to asbestos products produced by twenty companies. *See id.* at 617. The Third Circuit held that the class could not be certified because the class failed the typicality and adequacy of representation requirements of Rule 23(a) and the predominance and superiority requirements of Rule 23(b). *See id.* In *Georgine*, the Court observed that "[e]xamined as a litigation class, this case is so much larger and more complex than all other class actions on record that it cannot conceivably satisfy Rule 23." *Id.* at 618. Each plaintiff's claim raised "radically different" factual and legal issues from the other plaintiffs. *See id.* And, when exponentially magnified by choice of law considerations, these differences eclipsed any common issues in the case. *See id.*

This case is of a different species, however, because although there are numerically more class members here, eight million as opposed to two million, this case is infinitely less complex. *See generally* Appendix C, Georgine Comparison Chart. For example, there is only one primary defendant, there are economic damages only, and choice of law differences have been categorized into manageable categories.

[51] Rule 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the

of the Proposed Settlement, as required by Rule 23(e). *See, e.g., Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 826 (3d Cir.1973); *Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 324 (E.D.Pa.1993). The combined Class Notice must meet the requirements of both Rule 23(c)(2) and Rule 23(e). *See Carlough*, 158 F.R.D. at 324-25 ("The requirements of Rule 23(c)(2) are stricter than the requirements of Rule 23(e) and arguably stricter than the due process clause.").

110. The Court finds that the contents of the individual and publication notices provided class members the information necessary to make an informed and intelligent decision whether to participate in the class and whether to object to the Proposed Settlement. Indeed, the comprehensive notice program in this case far exceeded the requirements of Rule 23 and due process.

111. Federal Rule of Civil Procedure 23(c)(2) affords the right to opt out of a Rule 23(b)(3) class and requires that the parties send a notice to inform class members of this option. *See* Fed.R.Civ.P. 23(c)(2). Rule 23(c)(2) also requires that the notice indicate that the judgment will bind all class members who do not opt out and that any

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> member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

Fed.R.Civ.P. 23(c)(2).

member who does not opt out may appear through counsel. *See id.* Rule 23(c)(2) notice must be "the best practicable notice under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2); *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir.), *cert. denied*, 474 U.S. 902, 106 S.Ct. 228, 88 L.Ed.2d 227 (1985).

112. Notice of a proposed settlement under Rule 23(e) must inform class members (1) of the nature of the pending litigation, (2) of the settlement's general terms, (3) that complete information is available from the court files, and (4) that any class member may appear and be heard at the Fairness Hearing. *See* 2 *Newberg* § 8.32, at 8-103. The Court must consider both the notice's mode of dissemination and its content to assess whether the notice was sufficient. The nature and extent of Rule 23(e) class notice of a proposed settlement lies squarely within the discretion of the trial judge. *See Zimmer Paper Prods., Inc.*, 758 F.2d at 90 (observing that Rule 23(e) commits the form of the notice to the court's discretion); *Walsh v. Great Atl. & Pac. Tea Co.*, 96 F.R.D. 632, 642-43 (D.N.J.) (same) ["*Walsh v. Great Atl. & Pac.*"], *aff'd*, 726 F.2d 956, 962 (3d Cir.1983) (same); *see also Grunin*, 513 F.2d at 120-21 ("[T]he mechanics of the notice process are left to the discretion of the court subject only to the broad reasonableness' standards imposed by due process.").

113. Rule 23(e) notice is designed to be only "a summary of the litigation and the settlement [and] it is crucial to apprise class members of the right and opportunity to inspect the complete settlement documents,

papers, and pleadings filed in the litigation." *See* 2 *Newberg* § 8.32, at 8-109; *see also Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.) ("Class members are not expected to rely upon the notices as a complete source of settlement information"), *cert. denied*, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975). The notice need not be unduly specific. *See* 2 *Newberg* § 11.53, at 11-130 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir.1987) (holding that settlement notice that failed to detail a distribution plan was not inadequate), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988)). The notice need not include the entire settlement agreement. *See Grunin*, 513 F.2d at 122; *Carlough*, 158 F.R.D. at 332. Nor need the notice indicate arguments in favor of and against the proposed settlement. *See Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir.1974). The notice of the Proposed Settlement, to satisfy both Rule 23(e) requirements and constitutional due process protections, need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity present their objections."); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir.1977) ("Notice in a class suit must present a fair recital of the subject

matter and proposed terms and [give] an opportunity to be heard to all class members.").

114. No objector has challenged the mode of dissemination. Nor could any objector due [sic] so. Dissemination of the Class Notice in this case has been extraordinary. Where possible, each individual class member received individual notice. And the Class Notice was published in major newspapers throughout the country.[52] Indeed, the dissemination of the Class Notice was ideal. *See, e.g., Grunin,* 513 F.2d at 121 (stating that individualized notice by mail is the best notice practicable in the class action context); *In re Chambers Dev. Sec. Litig.,* 912 F.Supp. 822, 836 (W.D.Pa.1995) (holding that actual notice by mail in conjunction with published notice was best possible notice satisfying Rule 23(c)).

115. And the content of the Class Notice in this case clearly satisfies all of the necessary requirements. The Class Notice indicates the nature of the pending litigation. Stipulation of Settlement, Ex. F-2, at 4-7. The Class Notice indicates that any class member may opt out. *Id.* at 2, 4. The Class Notice indicates that any class member

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[52] Neither Rule 23 nor the requirements of due process require actual notice to each and every possible class member. *See Mullane,* 339 U.S. at 317, 70 S.Ct. at 658-59; *In re Domestic Air Transp. Antitrust Litig.,* 141 F.R.D. 534, 551 (N.D.Ga.1992). Many class members could not be located through reasonable effort. Supplementing individual notice with publication notice represents an appropriate balance between protecting class members and making class actions workable. *See, e.g., Weinberger v. Kendrick,* 698 F.2d at 61, 69-71 (mailed notice supplemented with published notice in only one newspaper).

who declines to opt out will be bound by the final judgment. *Id.* at 4. The Class Notice indicates the general terms of the settlement. *Id.* at 7-15. The Class Notice indicates that complete information is available in the Court files. *Id.* at 18-19. And the Class Notice indicates that any class member may appear and be heard at the hearing at the specified date, time, and place.[53] *Id.* at 18.

116. Several objectors have challenged the content of the Class Notice and the Supplemental Materials. These objections are unmeritorious. Certainly none of them indicates that this Court somehow abused its discretion in approving the form of notice. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 169 (holding that minor discrepancies were immaterial where essential goal of the notice requirement, notice of suit and opportunity to consult counsel, was accomplished); *In re Four Seasons Sec. Laws Litig.*, 525 F.2d 500, 503 (10th Cir.1975) (holding that notice apprised class members sufficiently of information that notice was intended under the Rule to convey).

117. Though the Court will address all of the objections that can be gleaned from the often profuse ramblings of several of the objectors, the Court pauses to observe the tension involved in drafting an appropriate

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[53] On January 6, 1997, this Court ordered that the Settlement Hearing be moved from January 21, 1997 to February 24, 1997. The Class Notice provided that the date of the hearing could be changed without further notice and that class members should verify the date of the hearing. Nevertheless, this Court ordered additional notice to all class members who indicated a desire to participate in the Fairness Hearing to indicate that the date of the hearing had been moved.

class action notice. On the one hand, the notice must be readable. Objectors have, for example, criticized the length of the Class Notice, arguing that policyholders cannot manage the extensive information provided. And, on the other hand, the parties must be careful to include the requisite core information. Objectors have complained also that the Class Notice fails to indicate nuances of the Proposed Settlement. The Court is mindful of the dichotomy and will assess the objectors' various grievances to ensure that neither the accuracy nor the readability of the Class Notice has been compromised. The Court has discretion to approve a wide range of possible notices, however, each of which would strike an appropriate balance between inclusiveness and brevity.

A. The Class Notice Adequately Describes the Allegations of the Complaint

118. Johnson complains that the Class Notice fails to adequately to [sic] describe the allegations of the Second Amended Complaint, the defenses Prudential may have, or to assess the strength of plaintiffs' claims. Johnson at 25. But, the Class Notice includes a general description, in plain English, of plaintiffs' allegations in the Second Amended Complaint, as well as Prudential's position in response to plaintiffs' claims. Stipulation of Settlement, Ex. F-2 at 5-6. And any class member who so desired could review all of the pleadings in the case, as the Class Notice clearly advised. *Id.*, Ex. F-2, at 18. The Class Notice thus complies with Rule 23. *See Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 799 (10th Cir.1970) (Rule 23 does not require the Class Notice to include "all the various

causes of action, theories of recovery and defenses alleged in the complaints and answers").

B. The Class Notice Adequately Advises Class Members of the Consequences of Deciding Not to Opt Out

119. Johnson argues that the Class Notice fails to advise class members of the rights and claims they will forego if they do not opt out. Johnson at 25. This assertion is belied by the Class Notice, which clearly advises class members, in plain English and bold typeface, that **"Prudential will be released from all claims that have been or could have been asserted by Class Members"** if the Proposed Settlement is approved. Stipulation of Settlement, Ex. F-2, at 16. The Class Notice further advises class members that the paragraph concerning the release is very important **"[b]ecause it will affect your rights if you remain in the Class."** *Id.* Thus, the Class Notice clearly and accurately states the consequences of not opting out of the class.

C. The Class Notice Need Not Describe Parallel State Court Proceedings or All Potential State Law Causes of Action

120. Johnson complains also that the Class Notice should have identified each state class action currently pending. Johnson at 25. Similarly, Krell contends that the Class Notice should have apprised class members of alleged state law violations that are not even asserted in the Second Amended Complaint. Krell Brief at 55. Both objections misinterpret the law: The Third Circuit and

others have repeatedly ruled that notice of a proposed settlement need not include information about parallel state court proceedings. *See, e.g., Bell Atlantic Corp.*, 2 F.3d at 1317-18 (notice need not describe objector's parallel state court litigation or its relative merit); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 224 (5th Cir.1981) (same), *cert. denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982). And if proceedings asserting state law claims need not be included, the Class Notice need not describe possible state law claims that have not been asserted against Prudential.[54]

D. The Class Notice Need Not Identify Objectors to the Proposed Settlement

Some objectors complain that the Class Notice should have advised class members that some states, such as Florida, had objected to the Proposed Settlement. Krell Brief at 48. Others argue that the Class Notice should have indicated that some state class actions have attempted to remove themselves from the Settlement. Johnson at 25. But the law is again clear that no notice of these occurrences is appropriate: the Class Notice need not inform class members that various parties or entities

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[54] This logic applies also to the contention that the Class Notice's reference to the Task Force investigation is misleading because the Class Notice fails to acknowledge investigations conducted by other states. Fla. AG at 14. Indeed, the Notice refers to the Task Force's investigation only because class members have already received notice of the Task Force Plan, and a failure to address the interaction between the Task Force Plan and the Proposed Settlement might have confused class members.

have objected to the proposed settlement. *See, e.g., Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir.1995).

E. The Class Notice Accurately Describes the Interaction Between the Task Force Plan and the Proposed Settlement

121. Johnson claims that the Class Notice fails to state that if policyholders opt out, they will not be entitled to relief under the Task Force Plan. Johnson at 27. This claim is based on the false premise that opt-outs will not be entitled to relief under the Task Force Plan. To the contrary, the Class Notice accurately advises that the Task Force Plan will be offered on February 1, 1997, to residents of those states that accepted the Task Force Plan whether or not the Proposed Settlement had been approved at that time. Stipulation of Settlement, Ex. F-2, at 21-22. The notices and election forms to select between ADR and Basic Claim Relief under the Task Force Plan were mailed by February 1, 1997 to policyholder residents of the 46 jurisdictions that have accepted the Task Force Plan, *regardless* of whether those policyholders have opted out of the Class settlement. Indeed, a special notice went to policyholders who live in these states and who excluded themselves from the Class. That notice specifically explains that those policyholders are entitled to relief under the Task Force Plan.

F. The Class Notice Adequately Indicates Class Members' Waiver of Their Right to a Jury Trial

122. Krell complains that the Class Notice fails to indicate that through participating in the Proposed Settlement, a class member waives the right to a jury trial for individual claims against Prudential. Krell Brief at 41. Krell, in keeping with his *modus operandi*, cites no authority in support of his objection, and his objection is spurious. First, the Class Notice explicitly informs class members that the Proposed Settlement releases Prudential for all causes of action or claims for damage. Stipulation of Settlement, Ex. F-2, at 16-17. Additionally, the settlement release is attached in whole to the Class Notice as Appendix A. Second, the Class Notice explicitly informs class members also that, absent exclusion, a class member cannot pursue his or her own lawsuit against Prudential for claims covered by the class action. *Id.*, Ex. F-2, at 2. Third, the Class Notice explicitly informs class members also of the alternative forms of relief available under the Proposed Settlement, none of which suggest the availability or preservation of a right to a jury trial.

G. The Class Notice Adequately Indicates Prudential's Agreement Not to Oppose Attorneys' Fees

123. Krell argues that the Class Notice does not adequately inform policyholders that Prudential "agreed not to oppose" Plaintiffs' request for an award of attorneys' fees. Krell admits that the Stipulation of Settlement explicitly states that: "Defendants agree not to oppose an application for award of attorneys' fees not to exceed a total of $90 million. . . . " Krell Brief at 43 (quoting Stipulation of

Settlement, ¶ K). Krell's argument fails, because there is no authority requiring that Prudential's agreement not to oppose attorneys' fees be repeated in the Class Notice. The Class Notice need not include the entire contents of the Proposed Settlement and all class members have access to the Stipulation of Settlement, itself.

124. Krell indicates that the Class Notice fails also because it falsely advised class members that Prudential, not policyholders, would pay plaintiffs' attorneys' fees. Krell Brief at 41. The Court disagrees. The Class Notice indicates that "class members will not be required to pay any portion of plaintiff's attorneys' fee." Stipulation of Settlement, Ex. F-2, at 23. This statement is not misleading to policyholders. Policyholders will not contribute out-of-pocket for attorneys' fees. And attorneys' fees will not be paid out of the benefits allocated to policyholders under the ADR or Basic Claim Relief.

125. The fact that Prudential is a mutual insurance company, and that future dividends may be impacted by Prudential's payment to attorneys, does not undermine the validity of the statement that "class members will not be required to pay any portion of plaintiff's attorneys' fee."[55] Most importantly, conceding for the sake of argument only that Prudential's payment of plaintiffs'

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[55] Krell argues that the notice to be accurate should have said: "Plaintiffs, through their equity interest in Prudential, will be required to pay all of Lead Counsel's attorneys' fees. . . . " This statement, following Krell's own logic, is clearly erroneous. Class members who bought policies during the Class Period, following Krell's logic, would not pay all of the I [sic] attorneys, fees, because the costs for attorneys' fees could impact all Prudential policyholders, class members or not.

attorneys' fees would impact existing policyholders, there is no requirement that the information be in the class notice. Any hypothetical collateral effect on existing policyholders would not represent the type of core information that is required in a Rule 23(e) notice. Moreover, it is far from clear that there would be any impact on dividend payments from Prudential's payment of plaintiffs' attorneys' fees. Non-company sources such as directors' and officers' liability insurance policies covering the Prudential officers named in the Second Amended Complaint may cover the attorneys' fees. And even if Prudential does pay the attorneys' fees, it is not clear that this payment will impact policyholder benefits. *See generally*, Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 80:53 (3d ed. 1996) (indicating that a member of a mutual life insurance company is entitled to dividends only after discretionary ascertainment and apportionment of divisible surplus by board of directors). Furthermore, the cost of continued litigation would potentially exceed the attorneys' fees at issue here and would have a greater impact on policyholder interests in Prudential than would the attorneys' fees agreement at issue.

H. The Class Notice Was Not Required to Include an "Opt-Out Form"

126. Objector Beauvias argues that the parties should have included an "opt-out form" in the Class Notice "for the convenience of the policyholders."[56] Beauvias at 12. Courts have often refused to allow an opt-

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[56] The Louisiana settlement that Beauvias forwards as an ideal settlement example does not provide a separate opt-out form with the settlement notice. Beauvias, Ex. 1.

out form to be included with a class notice, however, because the approach creates more confusion than it remedies. *See, e.g., In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. at 553-54 (finding that inclusion of opt-out form would confuse class members after considering expert testimony that in cases in which notice included both claim and opt-out forms, class members inadvertently completed both forms); *Roberts v. Heim*, 130 F.R.D. 416, 423 (N.D.Cal.1988) (observing that on balance "a separate form will engender confusion and encourage investors to unwittingly opt out of the class"); *see also* 2 *Newberg* § 8.21, at 8-70. And, in this case, the Class Notice clearly describes the steps to opt out, which are extremely simple. Stipulation of Settlement, Ex. F-2, at 17. Additionally, because Beauvias is the only objector to complain of the lack of an opt-out form, and because 19,000 class members managed to opt out, the Court finds that the Class Notice was adequate in this respect.

I. The Class Notice Was Not Required to Include Individual Policy Illustrations

127. Beauvias argues also that the Class Notice of the Proposed Settlement should have included both: (1) recreated copies of the illustrations that were shown to each policyholder and (2) a current, in-force policy illustration for comparison. Beauvias at 13. The Court disagrees. Beauvias does not cite, and this Court is unaware of, any authority requiring the level of individualized information that Beauvias demands. It appears quite

frankly that Beauvias' suggestion is not only unprecedented, but also preposterous. Recreating millions of policy illustrations, even if it could be accomplished, and even if it were palpably desirable, would be unduly burdensome, costly, and wasteful.

J. The Class Notice Adequately Informed Policyholders About the Information Considered in the ADR Process and Need Not Have Informed Policyholders Individually of Available Evidence

128. Texas argued that the Class Notice was faulty, because it provided "no method for Policyholders to determine what evidence exists in his or her particular case."[57] Tex. at 3. Texas argued that policyholders should be provided information concerning "sales practices complaints against the agent who sold the policy and, with respect to Financed Insurance claims, the extent to which the agent engaged in financial transactions." *Id.* at 5. Texas cited no precedent for the creation of such an individualized notice. And particularizing the notice to the individual level, in this case of more than ten million policies, would unduly complicate that Class Notice dissemination, if even individualization were possible.

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[57] Texas argued that the Supplemental Materials failed to explain which "records of the Company" would be considered in evaluating the policyholders' claims and whether the materials would be available to policyholders. Information of this detail need not be provided to class members in the notice of settlement. The Proposed Settlement is available to any class member upon request and provides this information in the ADR Guidelines. Stipulation of Settlement, Ex. B.

Moreover, Prudential has agreed to create an "800" number to supply policyholders the information that they need to make reasoned choices about relief. The Court addresses the substance of Texas's concern, that policyholders should have access to Complaint History information before choosing relief, in the Court's evaluation of the Proposed Settlement terms.

K. The Class Notice is Not "Cumbersome" or Inadequate to Alert Policyholders

129. The Florida AG had argued that the Class Notice and Supplemental Materials are "cumbersome." Fla. AG at 8. And the Florida DOI had asserted that the Class Notice and Supplemental Materials could not alert "currently oblivious policyholders" to the possibility that they may have had a claim. Fla. DOI at 18. As discussed above, however, there must be a careful balance between arriving at an appropriate Class Notice length and ensuring sufficient information. The Class Notice here, in conjunction with the Supplemental Materials, struck an appropriate balance between brevity and descriptiveness.

130. The Florida AG argued also that the Class Notice and supplemental materials are "simply incomprehensible to the vast majority of policyholders." Fla. AG at 15. The Florida AG provided details of a survey that purports to indicate that recipients do not recall receiving the Class Notice, are unaware of the pertinent deadlines, and did not understand how to exclude themselves, or that they could object. As Professor Cohen describes in his supplemental affidavit, these findings are meaningless, because the survey contains irreparable

flaws. Cohen Supp. Aff. at ¶ 16. The Florida Survey fails to comply with the minimum professional standards governing the design, execution, and reporting of survey research. *Id.* Foremost, the Federal Judicial Center's Reference Guide on Survey Research indicates that a court cannot evaluate survey evidence without specific information, which the Florida AG did not provide:

- a definition of the target population;
- a definition of the population actually sampled;
- a description of the sample design, including the method of selecting respondents, the method of interview, and the number of callbacks;
- a description of the result of sample implementation, including: the number of potential respondents contacted, the number not reached, the number of refusals, the number of incomplete interviews, the number of noneligibles, and the number of completed interviews;
- a copy of interview questions, questionnaire, and the interview directions; and
- a copy of any interview instructions, validation results, and the codebook.

131. The only information that Kerr & Downs provided addressing these issues is in paragraph 3 of Professor Downs' affidavit. The paragraph indicates that Kerr & Downs systematically and randomly sampled 600 Florida class members and contacted them by phone to ask them "a number of questions related to the Notice

and its contents." But this information is wholly inadequate for the Court to assess the reliability of the survey. The Court rejects the survey in its entirety.

132. Even if the survey were not flawed, Florida's conclusion that the Class Notice was inadequate is far from clear from the Florida AG's findings. For example, the survey demonstrates that of those who recall receiving the Class Notice and Supplemental Materials: 82% knew what the package was about; 71% read the booklet concerning the Proposed Settlement; and 71% knew what to do if they had questions. These findings, even though developed through Florida's flawed study, indicate that a great majority of those who received the Class Notice could comprehend it.

133. The Florida DOI argued that those who are unaware that they have a claim "will have no incentive to review" the Class Notice and Supplemental Materials. Yet, the best way to reach these policyholders is through individual notice of the class action and of the right to participate or opt out. The Class Notice tells policyholders that their so-called "vanishing premium" obligations may not vanish, that their "free" policies may not be free, and that their "investments" may be mere life insurance policies. Additionally, the clear title of the Class Notice: "OFFICIAL NOTICE FROM THE UNITED STATES DISTRICT COURT" reasonably alerts recipients of the importance of the contents, diminishing the likelihood that the notice would be tossed as junk mail.

L. The Class Notice Adequately Indicated the Deadline to File Objections or Opt Out

134. The Class Notice clearly, and in bold print, sets forth the pertinent deadlines. Stipulation of Settlement, Ex. F-1, at 4. Objectors Burnette and the Florida AG have observed that the Class Notice states that objections must be received by December 19, 1996, and that the Supplemental Materials indicate that the objections need only be postmarked by that date. This minor discrepancy does not undermine the adequacy of the Class Notice because the Court has considered all objections and respected all opt-outs that were filed by either date.

M. The Class Notice Fairly Describes Basic Claim Relief and Alternative Dispute Resolution Provisions

135. The Florida AG and Florida DOI argued that the Supplemental Materials steer potential claimants from the APR process towards Basic Claim Relief. Fla. AG at 10-11; Fla. DOI at 22-23. Also Texas argued that the Class Notice's statement that if a policyholder chose the APR Process the policyholder might not recover anything would induce injured policyholders to accept Basic Claim Relief. Tex. at 2-3.

136. Even a cursory review of the Class Notice and Supplemental Materials reveals that the APR is overall more prominent a remedy than Basic Claim Relief and that no "steering" occurs. Stipulation of Settlement, Exs. F-1 to F-3. For example, the APR relief is the first form of relief described in the Class Notice, in the Cover Letter, in

the Statement of Eligibility, and in the Questions & Answers materials.

137. These states argued also that the Class Notice's statement that "no relief will be afforded to policyholders whose claims are undermined" by the available evidence (i.e., scored as a "0"), steered policyholders to Basic Claim Relief. The argument fails because: (1) the statement is true; (2) the statement must be disclosed because it is integral to the Proposed Settlement and to a policyholder's decision whether to choose the APR or Basic Claim Relief; and (3) if a policyholder realistically believes that he or she was not misled and that the evidence will show that he or she was not misled, the policyholder should not choose the APR process. The above statement does not "steer"; it informs!

N. Objections that Ostensibly Attack the Class Notice But Really Concern Proposed Settlement Terms Will Be Addressed in the Context of the Proposed Settlement's Fairness

138. Objectors criticize the Class Notice also for describing accurately the terms of the Proposed Settlement, because the objectors find fault with these terms. For example, the Florida AG and Florida DOI argued that the Class Notice was misleading because Basic Claim Relief has no significant value to policyholders. Fla. AG at 10-12; Fla. DOI at 22. The Class Notice, however, describes clearly and accurately the components of Basic Claim Relief. Stipulation of Settlement, Ex. F-2, at 12-15. The Florida AG and Florida DOI argued also that the Supplemental Materials' discussion of the "impartial"

ADR decision-maker is misleading because the Proposed Settlement's Claim Evaluation Staff is insufficiently "impartial." Fla. AG at 13; Fla. DOI at 23. The Class Notice, however, describes clearly and accurately the precise composition of the ADR panels. Stipulation of Settlement, Ex. F-2, at 9-10. The Court evaluates these criticisms in considering the fairness of the Proposed Settlement, because the Class Notice accurately reflects the Proposed Settlement's provisions.

O. Considering All of the Circumstances, Class Notice in the Present Case Comports with Rule 23 and with Due Process

139. For the above reasons, the Court finds that the combination of individual and publication notice in this action was the most effective and best notice practicable under all circumstances and constituted due, adequate, and reasonable notice to all class members, satisfying the requirements of due process, Federal Rule of Civil Procedure 23, and the Rules of this Court. The Court finds also that the Class Notice, the Summary Notice, the Election Form, the ADR Claim Form, and the post-settlement notice methodology set forth in the Stipulation of Settlement are reasonably calculated, under all the circumstances, to apprise class members of their rights pursuant to the settlement and that these materials satisfy the requirements of due process, Federal Rule of Civil Procedure 23, and the Rules of this Court.

VI. The Proposed Settlement Is Fair, Reasonable, and Adequate In Light of the Multifarious Factors that the Court Must Consider

140. Federal Rule of Civil Procedure 23(e) provides that the Court must approve any class action settlement. See Fed.R.Civ.P. 23(e). The Court determines here that the Proposed Settlement is indeed fair, reasonable, and adequate and should be approved.

141. This Court "cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *GM Trucks*, 55 F.3d at 785. At least nine factors must be assessed to determine whether a proposed settlement is fair reasonable, and adequate, and deserving of court approval under Federal Rule of Civil Procedure 23(e):

> (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

Id. (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir.1975)) (hereinafter the "*Girsh* factors"); *see also Lake v. First Nationwide Bank*, 900 F.Supp. 726, 732 (E.D.Pa.1995). This nine-factor test requires this Court to conduct both "a substantive inquiry into the terms of the settlement relative to the likely rewards of litigation" and "a procedural

inquiry into the negotiation process." *GM Trucks*, 55 F.3d at 796. The Court must ensure that the case did not settle in the absence of sustained effort by class representatives sufficient to protect the interests of the class. Accordingly, the Court should consider also whether the parties completed sufficient discovery prior to settlement; the adequacy of settlement relief in light of the preliminary discovery; whether the settlement omits major causes of action or types of relief; and whether the parties negotiated simultaneously on attorneys' fees and class relief. *See id.*, 55 F.3d at 806.

142. The Third Circuit has observed that in assessing the fairness of a proposed settlement, the Court should be careful not to substitute its image of an ideal settlement for the compromising parties' views: "The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.*, 55 F.3d at 806 (citations omitted); *see also, e.g., Lake*, 900 F.Supp. at 732 (observing that significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class (citing *Austin v. Pennsylvania Dep't of Corrections*, 876 F.Supp. 1437, 1472 (E.D.Pa.1995))); *Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 79 F.R.D. 571, 576 (E.D.Pa.1978); *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F.Supp. 482, 488 (E.D.Pa.1985); *Walsh v. Great Atl. & Pac.*, 96 F.R.D. at 642-43.

143. Thus, the issue is whether the settlement is adequate and reasonable, not whether one could conceive

of a better settlement. *See In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 305 (N.D.Ga.1993) (stating a court "may only approve or disapprove the settlement as presented. It may not rewrite the settlement as requested by numerous objectors"); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir.1977) (in assessing fairness and reasonableness of settlement, the court is "not free to delete, modify or substitute certain provisions of the settlement").[58]

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[58] The Third Circuit observed that in evaluating the fairness of a proposed settlement, the Court should determine the range of reasonableness of the proposed recovery in light of the best possible recovery, the eighth *Girsh* factor, and in light of the risks of litigation, the ninth *Girsh* factor. 55 F.3d at 784. The Court expressed the calculus in formulaic terms: "in cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." 55 F.3d at 806 (quoting Manual for Complex Litigation 2d § 30.41).

In the current case, the Court finds, as discussed below, that the Proposed Settlement is fair in light of the best possible recovery and all of the inherent risks of litigation. In broad terms, the Proposed Settlement satisfies these tests because relief is uncapped and individual claimants receive full compensatory relief. The proposed calculus under which the Court would compare an estimated range of values for plaintiffs' claims against the value of the proposed settlement is inappropriate here; regardless of any estimate of the aggregate value of plaintiffs' claims under the Proposed Settlement, individual plaintiffs will receive full compensatory relief where they are entitled to that relief. And relief is uncapped.

To create a range of values to satisfy the Girsh factors would be pointless in light of the full compensatory relief available under the Proposed Settlement and the fact that individual and aggregate benefits are uncapped. Thus, while the Court fully addresses the eighth and ninth factors of the *Girsh* test, the

A. The Proposed Settlement Provides Extraordinary Relief to Injured Policyholders

144. Before embarking on a journey into an evaluation of the Proposed Settlement under the many criteria that this Court must consider, the Court must briefly explain why this Proposed Settlement is so exceptional. The Proposed Settlement's combination of Basic Claim Relief and an individualized ADR process evolved from the settlements approved in *New York Life*, Index No. 94/127804, 1995 N.Y. Misc. LEXIS 652, *and Michels v. Phoenix Home Life Ins. Co.*, Index No. 95/5318, slip op. (N.Y.Sup.Ct. Jan. 3, 1997). Courts, academic and industry experts, and various independent organizations have praised this settlement structure. In *New York Life*, the court found that "unlike some other class action settlements in which the value of the relief provided depended on highly contingent future purchases, the Class Relief here is tailored to meet the allegations of the Complaint and the specific insurance and investment needs of the Class Members." 1995 N.Y. Misc. LEXIS 652, at * 78. The court in *Phoenix Home Life*, echoed these sentiments. *See Phoenix Home Life*, slip op., at 50 ("The ADR Process is a no-cost and efficient mechanism. It provides an independent forum for the resolution of individual claims, and its objective procedure and substantive criteria negotiated by the parties in advance eliminate concerns of bias."). Moreover, the CPR Institute for Dispute Resolution honored the architects of the New York Life settlement including the Co-Lead counsel of plaintiffs in this case,

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Court's analysis accounts appropriately for the nuances of this Proposed Settlement.

Milberg Weiss Bershad Hynes & Lerach. Weiss Supp. Aff. at ¶ 32 and Ex. D.

145. Additionally, insurance regulators from fifty states and the District of Columbia have endorsed the Settlement, forty-six of whom had endorsed an earlier and inferior settlement. The Proposed Settlement provides greater procedural safeguards and creates financial guarantees that neither the Task Force Plan nor the *New York Life* settlement contained.

146. The Proposed Settlement benefits the class enormously. Relief is potentially unlimited – there is no cap.[59] The ADR process is fair and objective. And basic Claim Relief allows for remediation to individuals who choose not to partake of the ADR. The Proposed Settlement even provides Additional Remediation Amounts, the punitive damage counterpart to the Proposed Settlement, that will allow individual relief to exceed actual damages.

147. Additionally, plaintiffs are not liable for attorneys' fees, litigation costs, and notice or administrative costs.[60] Prudential has agreed under the Proposed Settlement to bear the substantial expenses of sending Class

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[59] Many settlements restrict an individual's ability to recover depending upon the aggregate number of claims filed, but here, through the ADR process, each class member may receive the full amount of compensation necessary to render complete relief.

[60] Under the Proposed Settlement, Prudential, not class members, must pay Class Counsels' attorneys' fees. Absent this agreement, the attorneys' fees could have been charged to the class.

Notice and implementing the Proposed Settlement. These costs include the costs of: printing and mailing more than eight million notices, publishing print notices in all fifty states and arranging multiple radio and television notices in all states, running the entire ADR process, and establishing the class action information center, toll-free "800" number, and operator staff (exceeding 1,000 operators) to respond to class member inquiries.

148. Additionally, the Proposed Settlement permits class members to submit claims immediately after the Court's approval of the Settlement and issuance of its Final Order and Judgment. Because many class members are elderly or in ill health, the ability of class members to receive substantial relief sooner rather than later – possibly years later – militates in favor of the Proposed Settlement. In this light, the Proposed Settlement appears to be the best possible recovery.

149. Because of these terms in particular, the Court finds that this settlement is extremely fair to the policyholders whom Prudential injured. The Court finds also that the Proposed Settlement is fair, reasonable, and adequate in light of the factors recently gathered in *GM Trucks*.

B. The Complexity of this Action and the Likely Lengthy Duration of the Litigation Warrant Approval of the Proposed Settlement

150. Courts consider the likely complexity and duration of litigation in evaluating the reasonableness of a settlement. *See GM Trucks*, 55 F.3d at 812 (concluding that lengthy discovery and ardent opposition from the

defendant with a plethora of pretrial motions were facts favoring settlement, which offered immediate benefits and would avoid delay and expense); *Lake*, 900 F.Supp. at 732-33 (weighing in favor of settlement that "due to the relative complexity of the issues involved and the amount of data that would need to be processed, the costs of litigating this matter through trial would likely be high" and, due to the thousands of class members involved, "the task of poring through the relevant records would clearly be a significant undertaking").

151. Although litigation certainly would be manageable and would be superior to other means of adjudicating the controversy, the issue here is the extent to which the anticipated complexity and costs of proceeding to trial favor settlement. In this case, the anticipated complexity, costs, and time necessary to try this case greatly substantiate the fairness of the settlement.

152. First, litigation of this case would raise some complex legal claims and defenses, which would include issues relating to conflicts of law, statutes of limitation, contract interpretation, statutory and common law fraud, causation, and damages. Some of these issues are discussed in this Court's opinion deciding Prudential's Rule 12(b)(6) motion. *See In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 1996 WL 392145 (D.N.J. May 10, 1996).

153. Second, the litigation would raise also many complex factual issues. The litigation concerns Prudential's marketing and sale of various life insurance products. Litigation of plaintiffs' claims would entail proof concerning the practices and procedures of the agents and brokers and the interaction between the agents and

brokers and Prudential's home office. In addition, the insurance products at issue are complex and would require actuarial and financial expert testimony to evaluate the assumptions underlying these products and the illustrations though [sic] which they were marketed to consumers. Litigation of plaintiffs' claims through trial would also entail extensive, time-consuming, and expensive proof of Prudential's internal procedures for establishing dividend scales, the quality and performance of Prudential's investment portfolio, and the decision-making processes relating to portfolio investments, dividend assumptions, and surplus determinations.

154. Thus, were this action litigated to its conclusion, the litigation would be legally and factually complex and extremely expensive and time-consuming. Class Counsel would require months to consult with additional experts, to prepare trial memoranda, to prepare post-trial memoranda, and to take interlocutory and other appeals. Moreover, if tried, the trial would last for months and would not be completed for years. *See, e.g., Weiss v. Mercedes-Benz of North America, Inc.*, 899 F.Supp. 1297, 1301 (D.N.J.1995) ("Given the crowded state of this Court's calendars, the case would not be tried prior to 1997. [opinion dated May 11, 1995] It is not unrealistic to predict that, if fully litigated, the present class action would not be concluded before the end of this decade. . . . "); *In re Warner Communications Securities Litigation*, 618 F.Supp. 735, 745 (S.D.N.Y.1985) ("Although much discovery has been conducted, much would remain if the parties were to go to trial.").

155. In contrast to trying the case, the Proposed Settlement permits a prompt and efficient solution to

plaintiffs' claims against Prudential; the Proposed Settlement would afford plaintiffs relief months and perhaps years earlier than would be possible in a litigation environment. The Proposed Settlement provides that class members may begin submitting claims if and when the Court issues its Final Order and Judgment. Additional benefits would then be provided if and when the Proposed Settlement receives final appellate court approval. Accordingly, the likely complexity and duration of continuing the litigation weighs in favor of approving the Proposed Settlement.

C. Class Reaction to the Proposed Settlement Has Been Overwhelmingly Favorable and Weighs in Favor of Class Approval

156. The Court finds that the favorable reaction of the Class and the regulators weighs in favor of approving the Proposed Settlement. *See Bell Atlantic Corp.*, 2 F.3d at 1313-14 n. 15 (holding that small proportion of objectors constituted tacit consent to settlement); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir.1990) (finding only twenty-nine objectors from 281-member class "strongly favors settlement"); *Weiss v. Mercedes-Benz*, 899 F.Supp. at 1301 (holding that "substantial silent consent weighs in favor of certification" where approximately 100 out of 30,000 class members objected or opted out of class).

157. The Court recognizes that courts are reluctant to interpret a failure of class members to respond as a sign that these class members approve of the settlement. *See GM Trucks*, 55 F.3d at 812 ("Even where there are no incentives or informational barriers to class opposition,

the inference drawn from silence may be unwarranted."). But, in this case, that so little negative feedback was received after such an extensive notice and outreach program, weighs in favor of approving of the Proposed Settlement. Of over eight million class members, only about 300 have filed objections to the Proposed Settlement. Fiandaca Decl. ¶ 11. Owners of 23,421 policies, or about 19,000 class members have opted out.[61] In terms of percentages, only .2 per cent of the class, less than one quarter of one percent, have criticized the Proposed Settlement or chosen not to participate in the class. *Id.* Thus, the numbers of class members who disapprove of the class action or the settlement are truly insignificant. And, the most vociferous objectors to the Proposed Settlement are a handful of litigants represented by counsel in cases that compete with or overlap the claims asserted in the Second Amended Complaint.

158. The Court also finds as an extremely favorable indicator of class reaction, the fact that the insurance regulators in all fifty states and the District of Columbia

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[61] Not all policyholders who opted out of the Proposed Settlement did so because they felt that it was inadequate. Over 700 of those who opted out, more than twice the amount of policyholders who objected to the Proposed Settlement's terms, wrote to indicate that they do not feel they were misled in the purchase of their insurance, are satisfied with their policies, and do not want to participate in the action against Prudential. Hegarty Supp. Decl. at ¶ 4. These favorable communications must also be considered in assessing the reaction of the Class to the Proposed Settlement.

have accepted the Proposed Settlement as fair and adequate. Thus, the regulators of all the states as representatives of their constituencies have indicated their complete approval of the Proposed Settlement.

159. Consequently, although the Court cannot assess class reaction by a mere numerical assessment, the numbers, in conjunction with the content of opt-outs and objections, and the support of regulators in all states weighs in favor of the Proposed Settlement.

D. Approval of the Proposed Settlement at this Stage of the Proceedings Is Appropriate Because the Plaintiffs Have Completed Extensive Discovery and Settlement Now Would Save the Extensive Costs of Additional Discovery and Trial

160. The Court also must consider the stage of the proceedings and the amount of discovery completed in assessing the fairness, reasonableness, and adequacy of the settlement. *GM Trucks*, 55 F.3d at 813; *Girsh*, 521 F.2d at 157; *In re Warner Communications Sec. Litig.*, 618 F.Supp. 735, 741 (S.D.N.Y.1985). The Court must examine the stage of the proceedings to assess "the degree of case development that class counsel have accomplished prior to settlement." *GM Trucks*, 55 F.3d at 813. This Court must determine whether counsel had an "adequate appreciation of the merits of the case before negotiating." *Id.* That appreciation may have been developed in the case at bar or "in some related proceeding."

161. In the current case, counsel for plaintiffs and Prudential did not commence serious settlement discussions until 18 months of vigorous litigation had transpired. Ashinoff Aff. at ¶ 3. Many motions had been argued and decided.[62] *Id.* Plaintiffs obtained voluminous discovery before settlement negotiations commenced and even more before negotiations concluded.[63] Ashinoff Aff. at ¶¶ 4, 8. Moreover, the parties had the benefit of the findings and results of the Task Force examination, which focused on many of the same issues raised in plaintiffs' complaints. *See In re Beef Antitrust Litigation*, 607 F.2d 167, 180 (5th Cir.1979) (considering discovery in companion cases); *In re Baldwin-United Corp.*, 105 F.R.D. at 483 (finding that counsels' access to expert testimony and other

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[62] In addition to conducting extensive investigations and formal discovery in this case, counsel have aggressively litigated many pretrial motions: consolidation motions, Prudential's 12(b)(6) motion, Prudential's primary jurisdiction motion, Prudential's precedent-setting motion regarding New Jersey RPC 4.2, motions to stay *Kittle* and *Krell* Actions, case management motions, an emergency motion regarding communication with class members, and a motion to the Court of Appeals by the plaintiff in *Viola Fisher v. Prudential Ins. Co.*, a Texas state court class action, to stay the preliminary injunction contained in this Court's October 28, 1996 Order.

[63] Prior to settlement, Class Counsel conducted substantial formal and informal discovery. Weiss Aff. at ¶¶ 60-74. Counsel evaluated more than one million pages of documents, approximately 160 computer diskettes and cartridges, and over 500 videotapes and audio tapes that Prudential produced. Plaintiffs also conducted twenty depositions, which included depositions of Prudential's senior managers. Additionally, Plaintiffs' extensive informal investigation encompassed interviews with hundreds of class members and former and current Prudential employees.

evidence from parallel state court proceedings and public documents demonstrated that counsel "availed themselves of all of these sources of information and conducted full adversarial negotiations"). By the end of July of 1996, the litigation had reached a point where counsel for both Prudential and plaintiffs could make an informed decision about the relative strengths and weaknesses of the case. Weiss Aff. at ¶¶ 104-05; Ashinoff Aff. at ¶¶ 3-5, 11.

162. Consequently, the record reveals and this Court concludes that prior to signing the Settlement Agreement, the parties had reached a stage in the proceedings where they adequately understood the merits of the putative class action and could fairly, safely, and appropriately decide to settle the action. *See Walsh v. Great Atl. & Pac.*, 96 F.R.D. at 654.

E. The Significant Risks Attendant to Plaintiffs' Ability to Establish Prudential's Liability and Damages Weigh In Favor of Approving the Proposed Settlement

163. In assessing the fairness, reasonableness, and adequacy of the Proposed Settlement, the Court must also determine the risks of establishing liability and damages at trial. *Girsh*, 521 F.2d at 157; *In re Warner Communications Sec. Litig.*, 618 F.Supp. at 741. In this regard, the *Weiss v. Mercedes-Benz* Court observed that "the risks surrounding a trial on the merits are always considerable." 899 F.Supp. at 1301. And this case is no exception.

164. On December 26, 1995, Prudential moved to dismiss plaintiffs' clams [sic] on various grounds, including statutes of limitations and the fact that many or all of plaintiffs' allegations allegedly were contradicted by written contracts or other writings. As a result of that motion, this Court dismissed many of plaintiffs' causes of action without prejudice and dismissed some class representatives' claims entirely.

165. And plaintiffs are not in the clear. Many obstacles could prevent plaintiffs from recovering after trial:

- the need to prove that class members were unaware, despite their receipt of written disclosures in policy forms and illustrations, that dividends or interest rates could fluctuate;
- the need to prove that class members were unaware, despite their receipt of written disclosures in policy forms and illustrations, that they had purchased life insurance or that the cash value would not accumulate in a life insurance policy at the rate at which it would accumulate in other investment vehicles;
- the need to prove that class members were unaware of the relative merits of using existing policy values to fund the purchase of new insurance policies;
- the need to prove that class members were deceived by Prudential's methods for determining and illustrating dividends and interest rates;
- the need to overcome Prudential's contention that plaintiffs' asserted contract rights are

barred by the Parol Evidence Rule because they are contradicted by the unambiguous language of the policies that constitute their contracts with Prudential;

- the need to overcome Prudential's contention that a one-year statute of limitations and three-year statute of repose would bar the federal securities claims of most class members who purchased VAL policies;

- the need to overcome Prudential's contention that the federal securities, common law fraud, and negligent misrepresentation claims are untenable because plaintiffs cannot demonstrate: that class members reasonably relied on oral statements contradicted by written materials, that Prudential intended to defraud Class Members, or that Prudential misrepresented present facts, rather than making unenforceable predictions of future performance; and

- the need to overcome Prudential's contention that the unjust enrichment claim fails to state a claim because valid written contracts bind the parties.

166. Additionally, another potential risk may be plaintiffs' necessary reliance on expert testimony to establish liability and damages; a jury's acceptance of expert testimony is far from certain, regardless of the expert's credentials. And, divergent expert testimony leads inevitably to a battle of the experts. *See United States v. 412.93 Acres of Land*, 455 F.2d 1242, 1247 (3d Cir.1972) (observing "the jury . . . is under no obligation to accept as completely true the testimony of any expert witness. It may adopt as much of the testimony as appears sound,

reject all of it, or adopt all of it."); *Rubenstein v. Republic Nat'l Life Ins. Co.*, 74 F.R.D. 337, 345 (N.D.Tex.1976); *In re Warner Communications Sec. Litig.*, 618 F.Supp. at 744 ("In this 'battle of the experts' it is virtually impossible to predict with any certainty which testimony would be credited. . . . ").

167. Indeed, some of the risks of a trial on the merits in this case have been demonstrated by the *Key* case in which an Alabama judge overturned the substantial jury verdict rendered against Prudential in the life insurance sales practice case involving similar allegations to those now at bar. *See Key v. Prudential Ins. Co. of America*, Civ. No. 93-479 (Al.Cir.Ct. Dec. 28, 1995).

168. Because establishing liability at trial and prevailing on appeal is not, and never can be, guaranteed, and because the Proposed Settlement is certain and avoids many of the obstacles potentially implicated by a trial, on balance the risks of establishing liability weigh in favor of approving the settlement.

F. The Risks of Maintaining this Class Action Through Trial Weigh in Favor of Approving the Proposed Settlement

169. Plaintiffs risk also that this action would not proceed as a class action through the conclusion of the litigation. Under Rule 23, the Court may decertify a class at any time during the litigation. And Prudential has endeavored to reserve the right to challenge class certification in the event that the Proposed Settlement is not approved and will certainly endeavor to challenge class certification if this case goes to trial. Thus, although the

Court finds that this case is manageable as a class action and that the class action device is the most appropriate means to adjudicate this controversy, as the case evolves, maintaining the class action may become unworkable and the Court may decertify the class. Accordingly, the risks of decertification weigh in favor of approving the Proposed Settlement.

G. Prudential's Inability to Withstand a Greater Judgment Is a Factor Weighing in Favor of Approving the Proposed Settlement

170. The Settlement is fair, reasonable, and adequate in light of Prudential's inability to withstand a much greater judgment.[64] *See Weiss v. Mercedes-Benz*, 899 F.Supp. at 1303. The value of the Proposed Settlement is extraordinary and Prudential's ability to withstand a greater judgment is a matter of concern.

171. The objective value of the settlement is extraordinary. The Proposed Settlement is at the bare minimum worth $410 million – experts have projected the value at between $1 billion and $2 billion. And there is no cap. Prudential must pay to remediate the claims of all of the claimants who allege that they have been misled; and

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[64] Prudential has argued that because defendants' liability is uncapped under the Proposed Settlement, there is no need for this Court to determine whether defendants could withstand a greater judgment. The Court disagrees. Prudential has provided no authority for its proposition. And, although compensatory relief is uncapped, the exemplary relief available under the Proposed Settlement, *i.e.* the Additional Remediation Amount, is limited.

many of these claimants will receive full or substantial remediation plus exemplary damages.

172. There is evidence that a greater judgment likely would adversely affect Prudential's credit rating, which has already declined during these proceedings, and would, thereby, affect Prudential's ability to compete, its revenues, and its profitability. Class Counsel agreed to require Prudential to pay no greater minimum than $1.080 billion, because of the likely effect that a judgment far exceeding $1 billion would have on Prudential's credit rating and ability to conduct business. Weiss Aff. at ¶ 214.

173. And the fact that Prudential is a mutual insurance company also impacts on Prudential's ability to pay a greater judgment. Because Prudential is a mutual insurance company, policyholders who are not members of this class action may be indirectly negatively affected, in the form of reduced dividends.

H. The Proposed Settlement Is Reasonable in Light of the Best Possible Recovery and All of the Attendant Risks of Litigation

174. The Court finds also that the Proposed Settlement is fair, reasonable, and adequate in light of the best possible recovery and the attendant risks of litigation. To estimate the best possible recovery for plaintiffs in the aggregate would be exceedingly speculative, and unnecessary here. In the present case, an individual's recovery exceeds the value of the best possible recovery discounted by the risks of litigation.

175. If a plaintiff's case is clear from the available evidence, the plaintiff will be scored a "3" and receive a choice between full rescissionary or compensatory relief plus interest. Indeed, because this plaintiff need not pay any litigation costs or attorneys' fees and the plaintiff will receive recovery much more quickly than would be possible through litigation, this recovery is not only fair, it is exceptional.

176. And if a plaintiff scores a "2," because the evidence on balance supports the claim, the plaintiff will receive 50% of the award that would be available with a score of "3," plus 100% of the interest on the claim. This plaintiff receives thus, 50% of damages, and need not pay litigation costs or attorneys' fees. And this plaintiff obtains more prompt relief than would be available through litigation. In sum, even where there is negligible evidence of wrongdoing, and where a plaintiff would not likely prevail after trial, the plaintiff receives an award equal to what a successful plaintiff would likely obtain after trial. The 50% award plus 100% interest is equivalent to a full award minus litigation costs, attorneys' fees, and the price of delay.

177. Additionally, a class member who receives a score of "1," because the available evidence neither supports nor undermines the class member's claim, may obtain Basic Claim Relief, even though at trial this class member would not likely have recovered under the predominance of evidence standard. This relief, thus, is fair.

178. Lastly, class members who choose Basic Claim Relief rather than participation in the ADR receive a value exceeding the value of the best possible recovery in

litigation discounted by the risks of litigation. Class members who choose Basic Claim Relief either do not feel misled or do not desire to participate in the ADR process. These class members hence would not have pursued litigation and in essence receive valuable life insurance and investment options for the release of claims that they would not pursue.

179. The Court finds, thus, that in this case the creative mix of the ADR process with the Basic Claim Relief options creates a settlement that benefits class members greatly more than litigation would. And, because class members who desired to pursue litigation, with its risks, in lieu of participation in the Proposed Settlement were permitted to opt-out, the Proposed Settlement is fair, reasonable, and adequate to all concerned.

I. Plaintiffs Conducted Adequate Discovery Precedent to Agreeing to Settle

180. This test captures the degree of case development that Class Counsel have accomplished prior to settlement. *GM Trucks*, 55 F.3d at 813. Plaintiffs must take discovery sufficient to establish the strengths and weaknesses of their case. *See Walsh v. Great Atlantic & Pacific Tea Co.*, 96 F.R.D. at 654; *In re Surgical Laser Technol. Sec. Litig.*, 1992 WL 328809, at *2, 1992 U.S. Dist. LEXIS 16724, at *3 (E.D.Pa. Oct. 29, 1992); *cf. GM Trucks*, 55 F.3d at 814 (finding that settlement at inchoate stage of case where plaintiffs failed to depose potential valuable witness suggested inadequate discovery).

181. Class Counsel here investigated all aspects of the allegations contained in the Second Amended Complaint. Plaintiffs reviewed and categorized approximately 1 million documents, 160 computer cassettes, 500 audio and video recordings, conducted hundreds of interviews with class members and current and former Prudential agents, and took twenty depositions. Weiss Aff. at ¶¶ 61-63, 72. And Class Counsel had access to, reviewed, and analyzed all of the discovery, and reports of the Task Force and Connecticut regulatory investigations. Indeed, the volume and substance of Class Counsel's knowledge of this case are unquestionably adequate to support this settlement.

182. Krell complains that Class Counsel's swiftness compromised discovery. But plaintiffs on two separate occasions refused Prudential's overtures to settle the case because plaintiffs did not have sufficient discovery to evaluate their claims. Weiss Aff. at ¶¶ 49, 101-02. There is absolutely no support for Krell's assertion of inadequate discovery as the result of undue haste.

183. Krell's argument that Class Counsel's use of informal discovery was inappropriate also fails. Informal discovery is perfectly adequate to substantiate claims. *See, e.g., In re Corrugated Container Antitrust Litig.*, 643 F.2d at 211; ("[W]e are not compelled to hold that formal discovery was a necessary ticket to the bargaining table. Because the plaintiffs did have access to information, this case cannot be characterized as an instance of the unscrupulous leading the blind."). The use of informal discovery was especially appropriate in this case because the Court stayed plaintiffs' right to formal discovery for

many months, and because informal discovery could provide the information that plaintiffs needed. Through informal discovery, plaintiffs obtained and evaluated thousands of pages of documents and conducted dozens of informal interviews. Weiss Aff. at ¶ 64. For example, though Krell complains that plaintiffs did not formally depose John Cressman, a former Prudential auditor, plaintiffs were the first to locate and interview Cressman, in July 1996. *Id.* at ¶ 74. Plaintiffs' completion of several lengthy interviews of Cressman, lasting a total of six hours, their review of the Helfrich memorandum, and their use of other informal discovery materially assisted plaintiffs in evaluating their claims. The propriety of plaintiffs' use of informal discovery, thus, is confirmed by the volumes of material information that plaintiffs required as a result of their efforts.

184. Krell claims that plaintiffs should have obtained Prudential's audit reports. But plaintiffs assumed in their negotiations that those reports would support their worst suspicions and negotiated the punitive Additional Remediation Amount, on that basis. Weiss Aff. at ¶¶ 98-100. Thus, the absence of the audit reports is immaterial.

J. The Proposed Settlement is Reasonable In Light of the Plaintiffs' Preliminary Discovery

185. Plaintiffs' preliminary discovery lent support to allegations of deceptive sales practices throughout the country. *See supra* commonality discussion. As discussed throughout, the Proposed Settlement provides full compensatory relief to any policyholder where the available

evidences supports that policyholder's claim. The Proposed Settlement also provides through Basic Claim Relief very significant and relevant relief to policyholders who cannot establish that they were injured. The Court finds that the Proposed Settlement's relief provisions, as discussed throughout this Opinion, are adequate to account for plaintiffs' discovery of widespread deceptive sales practices.

K. The Settlement Accounts for All Causes of Action and Types of Relief Sought in the Second Amended Complaint

186. In the current case, both the ADR process and Basic Claim Relief meet the allegations in the complaint and are specifically tailored to remedy the harms identified in the complaint. The ADR provides fitting relief to policyholders injured by any deceptive sales practices that occurred during the Class Period because it allows full rescissionary or restitutionary relief for established claims and slightly lesser but still very substantial relief for claims less clear from the facts. Also, Basic Claim Relief provides appropriate relief to class members because Basic Claim Relief directly helps class members to meet their insurance or investment needs. Although the Proposed Settlement, as any settlement, prevents individual plaintiffs from obtaining exorbitant punitive damage awards, this observation suggests not a fault of the Proposed Settlement, but the reality, and benefit, of class action litigation, in which plaintiffs share in any punitive damages award. Thus, it is clear that the Proposed Settlement is tailored to meet the allegations of the

Second Amended Complaint and that the Proposed Settlement remedies provide the relief sought in the Second Amended Complaint.

L. The Parties Completed Negotiations of the Proposed Settlement Before Negotiating Attorneys' Fees and the Attorneys' Fee Agreement Is Legal and Proper

187. The parties' negotiation of attorneys' fees was completely appropriate and followed the final settlement negotiations.[65] Plaintiffs' Counsel and Prudential did not negotiate attorneys' fees until after they had agreed on the appropriate relief and the Court had given its approval for the parties to discuss the fee issue. Weiss Aff. at ¶ 225; Ashinoff Aff. at ¶ 3.

188. Krell objects to Prudential's agreement not to oppose an attorneys' fee award of up to a specified amount, as determined by the Court, but this procedure is entirely proper. *See, e.g., Lake*, 900 F.Supp. at 734 (observing no impropriety in agreement, bargained for after settlement had been reached, that defendant would pay particular amount of attorney fees and any portion disapproved by the court would revert to defendant); *New York Life*, 1995 N.Y. Misc. LEXIS 652, at *89-96 (approving settlement and $22 million fee pursuant to separately negotiated agreement); 3 *Newberg*, § 15.34, at

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[65] Notably, a settlement agreement need not be filed "of record" prior to the commencement of fee negotiations. *See GM Trucks*, 55 F.3d at 804 n. 25 (parties could have obtained court approval to negotiate attorneys' fees simultaneously with the settlement itself).

15-98 to 15-99 (observing that negotiation of a fee agreement should not be discouraged).

189. Krell also unjustifiably attacks the parties' agreement that Prudential would pay half of the attorneys' fees to Plaintiffs' Counsel prior to any appeal. If the Court approves the Proposed Settlement and awards fees, the parties could begin to implement the Proposed Settlement immediately and counsel could collect the *entire* fee immediately. Under the fee agreement, Plaintiffs' Counsel receive less than is their right, not more, and not a "loan" as Krell postulates. The Court finds no impropriety in this arrangement.

M. Class Counsel's Approval of the Proposed Settlement Indicates Its Fairness

190. The judgment of counsel also weighs in favor of approving the Settlement. *See, e.g., Cotton*, 559 F.2d at 1330 (court is "entitled to rely upon the judgment of experienced counsel for the parties"); *Smith v. Vista Org., Ltd.*, 1991 WL 152612, at *5 (S.D.N.Y. July 30, 1991) (in appraising fairness of proposed settlement, view of experienced counsel favoring settlement is entitled to "considerable weight" (citations omitted)). In the current case, the Court credits the judgment of Plaintiffs' Counsel, all of whom are active, respected, and accomplished in this type of litigation. These counsel have indicated that in their professional view and judgment the Proposed Settlement is both comprehensive and fair, and that it provides valuable and sufficient economic benefits to the Class. Weiss Aff. at ¶ 197. The Court agrees.

N. The Objectors' Panoply of Other Concerns Fall Under Their Own Weight

1. The Proposed Settlement Improves Upon the Task Force Plan

191. Krell has mistakenly argued that the Task Force remediation program is superior to the Proposed Settlement. Krell Brief at 77-86. But the Proposed Settlement unequivocally and dramatically improves upon the Task Force Plan.[66] Weiss Aff. at ¶¶ 161-83; Hoyer Aff. at ¶¶ 9-16. Plaintiffs have repeatedly detailed the extensive improvements of the Proposed Settlement over the Task Force Plan. Weiss Aff. at ¶¶ 161-83; Weiss Supp. Aff. In addition, plaintiffs' actuarial expert has valued the improvements of the Settlement over the Task Force Plan at $1.123 billion. Hoyer Aff. at ¶ 19. Indeed, the Proposed Settlement's substantial improvements over the Task Force Plan are confirmed by the fact that the insurance departments of all fifty states and the District of Columbia have endorsed the Proposed Settlement as a positive development for their citizens and as an improvement over the Task Force Plan that forty-five of the jurisdictions had previously adopted. Thus, the Court concludes that the Proposed Settlement substantially

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[66] Some states had argued that the interim remediation plan was superior to the Proposed Settlement. Mass. at 10; Fla. AG at 20. These states only have conclusorily alleged that the interim plan was superior without reasoning their conclusions. The Court has no basis on which to evaluate the conclusion. Even if true, the statement does not undermine the fairness of the Proposed Settlement, which is fair in its own right and sustainable.

expands the relief to class members, and rejects Krell's contrary contention.

192. After an ostensible "line by line analysis of the similarities and differences between the Task Force Plan and Settlement Plan," Krell concludes that plaintiffs' counsel obtained "little, if anything, for the class." Krell Brief at 76. Krell's "line by line" analysis, however, rests entirely on two affidavits of his counsel's paralegal, S. Catherine Colder, whom the Court finds unqualified. Ms. Colder has no legal training, nor any professional expertise or qualifications for the substantive analysis that she undertakes. Colder Aff. at ¶ 2.[67] The Court credits her analysis not one iota.[68] *See Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir.1987) (observing that a trial court has discretion to exclude "conclusional testimony, of little value at best, that the settlement was inadequate, offered in the main by persons having financial or professional relationships with [the objectors].").

193. Nevertheless, to ensure an adequate record in the event, or eventuality, of appeal, the Court will address Krell's professed concerns. Indeed, Krell's line by

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[67] Ms. Colder summarizes her qualifications to conduct her analysis as a "Bachelor's Degree in Communications from Towson State University and more than three years of additional study at the graduate level in English and related disciplines." Colder Aff. at ¶ 2.

[68] The reliance of Krell's counsel, Michael Malakoff, on the affidavit of his paralegal in this context is patently inappropriate.

line analysis and, therefore, his conclusions defy even a cursory reading of the two plans.

194. Krell claims that under the Task Force Plan, the Claim Team was "completely independent of any Prudential involvement" while the parallel provision in the Proposed Settlement permits Prudential to select the Claim Team, subject only to veto by the Regulatory Oversight Staff and Lead Counsel. Krell Brief at 81. Krell overstates this distinction. Both the Task Force Plan and the Proposed Settlement require the Claim Team to be "wholly independent of Prudential." *Compare* Task Force Plan., Ex. A-3, at 10, ¶ II.J. *with* Stipulation of Settlement, Ex. C, at 10, ¶ II.J. Under the Task Force Plan, as Krell quotes, the Claim Team must be "mutually agreeable to the Regulatory Oversight Staff and the Company." Krell Brief at 81 (citing Task Force Plan, Ex. A-3, at 10, ¶ II.J). Under the Proposed Settlement, the Regulatory Oversight Staff and Lead Counsel must approve the Claim Team candidates proposed by Prudential. Stipulation of Settlement, Ex. C, at 10, ¶ II.J. The plans do not materially differ on this issue. If the change has any effect, it is to afford the Regulatory Oversight Staff and Lead Counsel the final authority to select the Claim Team.

195. Krell complains also that under the Task Force Plan a policyholder could request a rehearing of the Appeals Committee decision, the fourth level of review, if the policyholder believed that the appellate decision operated as a "manifest injustice," but under the Proposed Settlement only the Claimant Representative can make the "manifest injustice" determination. Krell Brief at 82. The Claimant Representative, however, provides another layer of protection to policyholders and has the

requisite knowledge and experience to determine whether the appellate decision operated as a manifest injustice. The Claimant Representative is appointed by Lead Counsel and must be experienced in commercial dispute resolution or the life insurance industry. If there is any reasonable basis to believe that a manifest injustice has occurred, the Claimant Representative will request a re-hearing. And under the Proposed Settlement only, the policyholder may have another Representative to assist with the rehearing. Stipulation of Settlement, Ex. C, at 22, ¶ V.C.5. A policyholder dissatisfied with a prior scoring decision might believe that he or she was inadequately represented initially and desire new representation.

196. Krell argues that the Proposed Settlement is inferior to the Task Force Plan also because the Proposed Settlement would exclude privileged documents from consideration in the ADR process. Krell Brief at 79. Krell directs us to the underscored language concerning the assembly of claim files in the Proposed Settlement's ADR process:

> The file for a particular Claim will contain copies of all documents transmitted to, or prepared or obtained by, the Claim Evaluation Staff with respect to the claim, including, without limitation, to the extent available in the Company's records (*including the non-privileged Company documents . . . held by Defendants' Counsel*), the following materials: . . .

Stipulation of Settlement, Ex. C, at 5, ¶ II.F (emphasis added) Krell errs because this language irrefutably expands the realm of records that may be searched for claim evaluation purposes. The corresponding Task Force

Plan provision limited the search to records in Prudential's direct possession. Task Force Plan, Ex. A-3, at 4, ¶ II.F. In negotiating the Proposed Settlement, the parties agreed to include records in the possession of Prudential's counsel. Only privileged documents, which would be nondiscoverable, are excluded from the claim file assembly process.

197. Krell argues that the Proposed Settlement is inferior to the Task Force Plan also because the definition of "Interest Rate" has changed. Krell Brief at 77-78. According to Krell, the change in the definition has reduced benefits to class members. The parties to the Proposed Settlement changed the wording of the definition to clarify the calculation of interest as set forth in the Task Force Plan. The definition does not change the amount of interest that will be provided to policyholders. *Compare* Task Force Plan, Ex. A-1, at 5, ¶ I.C. *with* Stipulation of Settlement, Ex. B, at 6, ¶ I.C.

198. Krell argues that a change in the way that "Agent Statements" are prepared "appears to substantially decrease the amount of evidence available to class members to prove their claims." Krell Brief at 80. The ADR process requires the Claim Evaluation Staff to request the selling agent to furnish an "Agent Statement" concerning the claim.[69] Stipulation of Settlement, Ex. C, at

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[69] The agent will be asked to provide also "any other facts or documents . . . that might be relevant in assessing the Claim, including whether the agent knows . . . whether any documents . . . specifically pertaining to the Claim have been destroyed . . . , and whether copies of such documents cannot be located." Stipulation of Settlement, Ex. C, at 6, ¶ II.G.2.b.

6, ¶ II.G.2. Under the Task Force Plan, an unsworn or unsigned agent statement is "Available Evidence." Task Force Plan, Ex. A-2, at 6, ¶ II.G.2.b. Under the Proposed Settlement, unsworn or unsigned agent statements are not considered to be "Available Evidence." This change does not harm policyholders, however. Stipulation of Settlement, Ex. C, at 6, ¶ II.G.2. First, although there may be less evidence under the new provision, there will not be less credible evidence; an unsworn and unsigned statement has no indicia of reliability. Second, where an agent refuses to cooperate by signing a statement, the class member's score is enhanced by one, regardless. Stipulation of Settlement, Ex. B, at 11, ¶ I.F.1.d. Accordingly, Krell's complaint is unfounded.

2. ADR Review Is Impartial

199. Some objectors incorrectly argue that initial review of the ADR claims by the Claims Evaluation Staff is not sufficiently impartial because the Staff is comprised of Prudential employees. Fla. AG at 13-14; Beauvias at 18; Johnson at 23-24. The Claim Evaluation Staff consists of qualified professional administrative Prudential employees wholly independent of Prudential's marketing or sales functions. Stipulation of Settlement, Ex. B, at 4, ¶ I.C. Moreover, the Staff does not include employees who have been agents or who have directly supported agents. *Id.* Additionally, many of the scoring factors are objective and not subject to interpretation. *Id.*, Ex. B, at 16, ¶ II.A. And the Staff has no incentive artificially to minimize ADR scores because the entire evaluation,

review, and appeals process occurs at Prudential's expense.[70]

200. Moreover, the ADR's multiple levels of review by undeniably impartial non-employees also ensures that the ADR process is impartial. The Claim Team, composed of individuals wholly independent of Prudential, reviews all scores of less than "3." The Claim Team then recommends an appropriate score to the Claims Review Staff. Later, the Appeals Committee may finally review the policyholder's claim. The argument that this process is not fair and impartial is untenable.

3. The ADR Process is Simple

201. Beauvias argues that the ADR process is "onerous," requires the submission of "endless forms," and forces a policyholder to challenge a decision in several forums before a final decision can be obtained. Beauvias at 17-18. Treadway argues that the Proposed Settlement is unfair because it "puts the initial onus on defrauded life insurance customers to initiate a mini-trial." Treadway at 4. The Florida AG had argued that the ADR process is too "bureaucratic" and "complicated." Fla. AG at 13. The Florida AG submitted a 46 page "flow chart" prepared by its expert to support the Florida AG contention that the ADR process is overly complicated.

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[70] Even if one anticipates that Prudential will act at any cost to achieve its own self-interest, thus, the economics of the ADR process ensure that Prudential will be fair and generous in the initial and every stage of the review process.

Oscher Report, Attach. B. Also, Krell submitted an elaborate flow-chart to show the purported complexity of the Proposed Settlement and its unfairness to class members. Colder Aff., Ex. E. These objectors are mistaken.

202. The ADR process is uncomplicated. To participate in the ADR process, the policyholder need only check a box on the Election Form, complete the Claim Form provided, attach any available documentation, and return the information in postage-prepaid envelopes.[71] Stipulation of Settlement, Ex. C. The available "800" number facilitates the process. *Id.*, Ex. C, at 4, ¶ II.D. Claimants need not appear personally. Nor need a claimant retain counsel, though a claimant is free to do so.

203. Consequently, and contrary to the objectors' contentions, the ADR process is quite simple for policyholders. Policyholders are spared the burden and expense of typical litigation, while Prudential performs the enormous and costly administrative processes. Prudential has projected, in fact, that its administrative costs for the Proposed Settlement will substantially exceed $100 million. Meade Aff. at ¶ 10.

204. The Florida AG and Krell flow charts are grossly misleading because they attribute to the policyholder all calculations of the ADR process, the large

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[71] Only in the case of appellate review will the policyholder have any further action to take and seldom will appellate review be necessary because, as discussed above, Prudential has an incentive to resolve claims quickly and generously. And even where appellate review is necessary, the Policyholder Representative will assist the policyholder at no cost to the policyholder.

majority of which do not involve policyholders. Prudential is correct in asserting that this approach is tantamount "to diagramming the internal operating system of a computer and arguing that a lay person cannot possibly use the machine." Pru. Reply at 19-20.

205. At the Fairness Hearing, Ms. Chin stated that her father had received misinformation from an operator at the "800" number. February 24, 1997 Tr. at 153-54. Though over 500,000 calls were received at the "800" number, no other complaints have been registered regarding the number. Although an occasional blip in "800" service is extremely unfortunate, the occasion does not undermine the Proposed Settlement's fairness. The parties are devoting substantial resources to ensuring that all individuals who interact with class members regarding the settlement are appropriately trained and supervised.

4. The ADR Process Provides Adequate Substantive Relief

206. The ADR process provides each classmember an opportunity to receive full compensatory or rescission based relief, plus an Additional Remediation Amount (the equivalent of exemplary relief or punitive damages). Class members may be entitled to this relief without purchasing any additional products from Prudential. There is no monetary cap or ceiling on the amount that Prudential may pay to each claimant or all claimants.

207. The Florida DOI had submitted the opinion of Steven S. Oscher of Oscher Consulting, P.A. in an effort to demonstrate that the Proposed Settlement is not valuable.

Oscher Aff. Although the Florida DOI has since withdrawn the submission, the Court addresses Oscher's analysis because other objectors have incorporated his conclusions by reference. Oscher's conclusions are not persuasive because his assumptions are mistaken.

208. For example, Oscher erroneously assumed a 4% interest rate. *Id.*, Ex. A, at 4-5. This interest rate is substantially less than the Interest Rate under the Proposed Settlement. The Proposed Settlement calculates interest at a variable rate, the actual rate in effect between the date the policy was issued and the date of award, plus 1.5%. Stipulation of Settlement, Ex. B., at 6, ¶ I.C. (defining "Interest Rate"). The applicable Interest Rate from 1982 through 1995 ranges from 5.04% to 9.97%. Weiss Supp. Aff. at ¶ 54. Oscher concludes that his hypothetical claimant is not made whole in reliance on his own incorrect assumed rate.

209. In addition, Oscher misstates the function of the Financial Guarantees. Oscher complains that there is no logical reason that the first 330,000 policyholders should receive a greater remediation amount than subsequent remediated policyholders. Oscher Aff., Executive Summary, at 6 & Ex. D. This statement reflects a misunderstanding of the Proposed Settlement. If there are more than 330,000 claims remediated, the Financial Guarantees do not benefit the first 330,000 claimants to the detriment of later claimants. Rather, as is clear from a careful reading of the Stipulation of Settlement, the difference between the amount actually spent and $780 million will be allocated proportionally to all claimants, not merely

the first 330,000 remediated claims. Stipulation of Settlement at C.5.a. and Ex. B, at 39, VI ("Allocation of Additional Remediation Amount").

210. Oscher also misunderstands Prudential's position in the ADR process. According to Oscher, the Financial Guarantee will result in Prudential skewing the scores of all claims exceeding the first 330,000. Oscher Aff., Executive Summary, at 5. The process is unquestionably designed, however, to prevent misscoring.

5. The Proposed ADR Scoring Provisions Adequately Determine Whether Prudential Misled Individual Class Members

211. The ADR procedures provide relief without regard to a policyholder's ability to establish materiality, causation, damages, or any other of the requirements that would apply in formal litigation. Nevertheless, California, the Florida AG, the Florida DOI, and Massachusetts argued that a score of "3" is too difficult to obtain. Cal. at 4-5; Fla. DOI at 6-8; Fla. AG at 13. Beauvias argues that the scoring system is "stacked" against individual class members. Beauvias at 17.[72] The Court finds, however, that the score of "3" is available to all claimants who establish that they are entitled to full relief.

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[72] As an interesting aside, Beauvias' counsel attempted recently to settle a Louisiana class action against *New York Life* using an ADR mechanism similar to the one at bar. Beauvias, Ex. 1.

212. For example, a "3" will be awarded whenever the producing agent confirms the allegation that a misstatement occurred in connection with the underlying sale of insurance.[73] And if an agent refuses to cooperate in the ADR process, the policyholder's score will also be enhanced.

213. Additionally, a "3" will be awarded whenever "Company Documentation" expressly supports the conclusion that a misstatement occurred.[74] "Company documentation" broadly includes correspondence from

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[73] Objectors argue that the agent will rarely admit that a misstatement occurred in connection with the sale of the insurance policy. The Court disagrees.

Many agents have already readily acknowledged that misstatements were made in the sale of replacement policies, abbreviated payment policies, and retirement plans. As James Helfrich observed in his widely reported memorandum to Prudential management, "the common response when agents were questioned as to why they used financed or abbreviated pay mechanisms for selling insurance has been: 'that's the way we were trained.' " Memorandum from James Helfrich to David Fastenberg dated November 16, 1992 in Pls. Evid. Sub., Vol. 2, Ex. H-1. Many of these agents have filed suit against Prudential based on allegations that would support a "3." Other agents have submitted statements to the state agencies that are investigating Prudential. Fla. DOI at 4 (indicating that the Florida DOI has or knows of sworn testimony and documents that demonstrate that, among other things, Prudential's field sales management actively encouraged churning).

[74] The Florida DOI argued that Company Documentation will be unavailable in churning situations, "dooming" victims of this practice to a "2." Fla. DOI at 7-8. Many individuals have observed otherwise. For example, John Cressman, the Florida DOI's own witness, contradicts the Florida DOI's contention. Cressman testified in his deposition that agents often used blank, signed disbursement forms to complete replacement

Prudential or its agents, policy illustrations, applications, and sales materials. Stipulation of Settlement, Ex. B, at 5, ¶ I.C. The materials would encompass, for example, misleading vanishing premium illustrations,[75] retirement plan sales materials, and application materials reflecting replacement policy sales. These materials also would encompass commonplace handwritten notations confirming contemporaneous or prior misstatements.

214. Also, the ADR procedures incorporate several factors, "positive considerations," that may increase a score of "2" to a "3."[76] These considerations may afford relief to a policyholder if any of several circumstances surrounded the sale of the policy at issue. For example, if the agent without authority executed the policyholder's signature on a transaction document, the claimant automatically will receive a score of "3." Additionally, a claimant who normally would score a "2" may score a "3"

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transactions. Deposition of John Cressman, dated September 28, 1996 at 27:2-38:13; *in* Fla. DOI App., Ex. F. Also the Task Force has indicated that blank disbursement forms are a common churning tool. Task Force Report at 188-89. And objector Krell exclaims that replacement is "easily demonstrated by the policyholder's underwriting file at Prudential." Krell Brief at 6 n. 3; *see also Pietz* Aff. at ¶ 19 (listing types of Prudential records indicating improper replacement).

[75] Massachusetts incorrectly argued that "Company Documentation" would not include the vanishing premium illustrations. Mass. AG at 12.

[76] To obtain the score of "2," which may be increased to a "3" based on an assessment of the positive considerations, the claimant need demonstrate only that the oral and written evidence "on balance supports the claimant's allegation." Stipulation of Settlement, Ex. B, at 9, ¶ I.D.

if, for example: (1) the agent used unauthorized or altered sales materials or illustrations in connection with the sale, (2) the agent was terminated or otherwise disciplined or fined due to improper sales practices; (3) the agent refused to cooperate with the claim investigation; (4) the sale or servicing of the policy violated applicable state or federal regulations; or (5) documents relevant to the claim have been improperly destroyed or removed. Stipulation of Settlement, Ex. B, at 9, ¶ I.D.

215. In addition to understating a claimant's ability to score a "3," some of these objectors understate the quality of relief available to those who score a "2." Claimants awarded a "2" will receive compensatory relief equal to more than 50% of their actual damages, plus possibly a share of the Additional Remediation Amount. *E.g., Id.*, Ex. B, at 19, ¶ II.C.1.b. As Massachusetts has conceded, this is "meaningful relief." Mass. at 12. Moreover, this relief is not diminished by attorneys' fees or costs as would be the case in an ordinary civil proceeding. Absent the Proposed Settlement, the policyholders somehow able to secure representation on a contingent fee basis would pay 30% to 40% of their recovery, plus litigation costs, to their counsel.

6. The ADR Process is an Appropriate Mechanism to Assess Whether Class Members Were Affected by Prudential's Deceptive Sales Practices

216. Treadway objectors argue that there should be an independent audit to initiate and remediate claims, so that individual class members need not act to receive

relief. Treadway Supp. at 3. According to the Treadway objectors, the victimized policyholder demographics – injured policyholders were often elderly or uneducated – mandate automatic remediation. *Id.* at 5. Treadway objectors argue that the need for an automatic auditing system also is supported by Prudential's deliberate destruction of damaging evidence. *Id.*

217. Treadway errs. Courts widely have recognized that it is generally appropriate to require each class member to demonstrate his or her entitlement to relief under the ADR. *See, e.g., Franks v. Kroger Co.*, 670 F.2d 71, 72-73 (6th Cir.1982) (affirming employment action settlement requiring class members to prove they were subjected to discrimination before receiving relief); *Carbone v. Gulf Oil Corp*, No. 85-361, 1989 WL 86950, at *2-7, 1989 U.S. Dist. LEXIS 8805, at *5-10 (E.D.Pa. July 27, 1989) (approving settlement requiring claimants to submit substantiated proofs of claim demonstrating entitlement to relief).

218. Moreover, the ADR process does in effect presume that claimants are entitled to relief unless Prudential proves otherwise. A policyholder will be entitled to no relief only where the evidence, on balance, shows that no misrepresentation occurred. Where evidence is evenly divided policyholders will receive a "1," which may in many cases be enhanced to a "2" by the positive considerations discussed above.

219. And the Proposed Settlement must be assessed as a whole; the Court cannot extricate an individual provision from the plan. Plaintiffs achieved minimum guarantees, additional remediation amounts, and other benefits under the Proposed Settlement that may benefit

policyholders more than the provisions that the objectors request.

7. The ADR Process Adequately Identifies Churning Cases

220. According to some objectors, the Proposed Settlement unfairly requires each class member to initiate and prove his or her right to compensation through the ADR Process. Treadway Supp. at 3-4. These objectors argue that Prudential policyholders who were churned should be identified objectively through an independent audit using the "exact match" system and should be automatically compensated. *E.g., id.* The Court rejects the argument that the "exact match" system is preferable to the ADR procedures. To presume that all of Prudential's financed sales were wrong, ignores the reality that financing can be in the best interest of the consumer. The consumer may desire to meet increased life insurance needs without any immediate cash outlay, for example. Lautzenheiser Aff. at ¶ 3. Neither the "exact match" system, nor any presumption that a financed transaction is fraudulent, is an appropriate replacement for the ADR, which appropriately discerns whether a given transaction was improper and affords the affected policyholder adequate relief.

221. The "exact match" system isolates all new policies issued for which the premiums equal the amount of disbursements from old policies where the disbursement was made within 90 days of the issuance of the new policy. Treadway Supp. at 4. This system can be used whether or not the original policy was from Prudential,

because Prudential's files contain records of disbursements of both Prudential and non-Prudential policies. *Id.* at 4 n. 3.

222. The "exact match" system is unnecessary, because the ADR adequately remediates policyholders who believe that they were induced through deceptive sales practices to buy their policies. And the "exact match" system is inappropriate because it detects as "matches" replacement transactions that are not illegal, fraudulent, or otherwise improper. All states permit replacement sales to occur and experts agree that financed life insurance sales may be in the best interest of the policyholders. Lautzenheiser Aff. at ¶¶ 13-24. No states have prohibited financed insurance or replacement sales; nor have they found that these practice are misleading or improper *per se*. *Id.* at ¶ 3. Rather, states have prescribed appropriate safeguards to ensure that policies are financed properly, with clear and complete disclosure, and in a manner that protects the consumer against fraud and misrepresentation.[77] *Id.* at ¶ 14.

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[77] None of the four states that objected to the Proposed Settlement have ever prohibited financed insurance sales and three of the four did not regulate in any respect financed insurance sales for great portions of the Class Period.

Texas did not in any respect regulate insurance replacement during the Class Period. Massachusetts enacted in 1987 regulations that do not proscribe replacement activity. Mass. Regs.Code 34.00 (1987). California enacted in 1990 replacement regulations that do not proscribe replacements. Cal. Ins.Code § 10509 (1990; amended 1991). Florida is the only objecting state to have regulated replacement transactions early on.

California, Massachusetts, and Florida replacement regulations do not prohibit replacement transactions, but

223. Indeed, federal and state regulators, life insurance industry associations and consumer advocates have long recognized that financing or replacements may be in the best interest of a policyholder. *Id.* The laws only prohibit misleading or deceptive practices. *Id.* at ¶¶ 19-24. The Task Force, for example, found that when

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require that the insurer provide prospective purchasers adequate information regarding replacement transactions. Each of the states' regulations specifically acknowledges that replacement may be in the best interest of the policyholder.

California, for example, requires the following notice to be supplied to all consumers who are contemplating a replacement of existing insurance policies:

> Are you thinking about buying a new life insurance policy or annuity and discontinuing or changing an existing one? If you are, *your decision could be a good one – or a mistake* . . . Make sure you understand the facts . . . Hear both sides before you decide. This way you can be sure you are making a decision that is in you [sic] best interest.

Cal. Ins.Code § 10509.4 (emphasis added). And both Massachusetts and Florida require a nearly identical notice. *See* Mass Regs.Code tit. 211, § 34.04; Fla Admin. Code Ann. r. 4-151.006 (1992).

Even Florida, which was the most vociferous proponent of the churning presumption for all replacements, has never enacted a broad prohibition of financed insurance in its own laws. As recently as 1995, Florida passed an "anti-churning" law that emphasizes that the replacement that is prohibited involves fraud: to be prohibited, replacement must be done in a manner that is "fraudulent, deceptive or otherwise misleading or that involves a deceptive omission." Fla. Ins. Laws § 626.9541(aa) (1995).

interest rates were high in the 1980s financing new policies with values from older policies may have been a sound financial decision for some policyowners:

> [W]hen interest rates were high and universal life and "interest-sensitive" whole life products were being developed, the replacement of old life policies sold at rates based upon old mortality tables and offering low interest rates could have been viewed as a sound financial decision for many policyowners. These new products were designed to compete with banks, money market funds and newly founded life insurers that could offer new money interest rates that were at an all-time high.

Task Force Report at 7.[78]

224. Moreover, the ADR process is preferable to the "exact match" system, because the ADR process incorporates the actual protections afforded by state laws as they have existed over time. A violation of any state law or regulation applicable at the time of sale, whether replacement or otherwise, is deemed evidence that the policyholder was misled, and directly factors into the scoring of his or her claim. Stipulation of Settlement, Ex. B, at 11, ¶ I.F.1.e (including as a positive consideration a violation of state insurance statutes or regulations).[79] Additionally,

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[78] Notably, Prudential was not alone in selling many replacement policies during the Class Period. Industry-wide replacement totalled 45% of new premium payments in 1984, 47% in 1985, 43% in 1986, and 40% in 1987. M&R Fact Sheet.

[79] Krell argues that the Proposed Settlement deprives policyholders of state law protections concerning the replacement of life insurance policies. *See* Krell at 54-56. Krell's

if the available evidence does not include executed forms required to be retained under state law, the Company is deemed to have violated applicable regulations and the claimant receives no less than the rescission remedy for a claim attaining a score of "2" without any deduction for term insurance costs. *Id.*, Ex. C, at 10, ¶ II.A.5.

8. The ADR Process Adequately Identifies Cases in Which Prudential Sold Life Insurance Policies as Investment Vehicles

225. Objectors argue also that an "even premium/odd face amount" test should be used to detect life insurance policies sold as investment vehicles and to provide automatic relief to class members. Fla. DOI at 14-15; Treadway at 4. The "even premium/odd face amount" test is inferior to the current ADR process, however.

226. According to these objectors, ordinary life insurance policies are sold to achieve a face value of even increments, *e.g.*, $1,000 investments. Treadway at 4. The premium payments on these policies are calculated to achieve the desired face amount, and rarely result in premium payments equaling round numbers, i.e. multiples of $5. *Id.* The Florida DOI system detects policies for which premium payments are in unusually round numbers, such as $50, $55, or $75, and the face value of the policy is not in $1,000 increments. *Id.* Because people who desire to save often desire to save in multiples of $5,

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objection fails to account for the fact that the ADR scoring procedures specifically incorporate state replacement regulations.

where an agent sells a policyholder a policy for investment purposes, according to these objectors, the agent begins with a round numbered monthly payment or premium, e.g., $25 per month, and then backtracks to determine the face value of the policy, which often involves dollars and cents, e.g., a face value of $65,243.23. *Id.* According to Treadway and the Florida DOI, locating so-called "even premium/odd face amount" policies is tantamount to locating insurance policies sold as an investment vehicle and qualifying polices [sic] should receive full relief. *Id.*; Fla. DOI at 14-17.

227. But, there is no basis to presume that a policy having a face value that is not a multiple of $1,000 was sold as an investment and not a life insurance policy. Indeed, using the presumption would likely identify legitimate VAL sales, rather than solely improper transactions, because it was a common practice for Prudential representatives to work out an even premium schedule dictated by a client's ability to make regular payments. Fiandaca Decl. at ¶ 8. And, this sort of premium-driven transaction often results in a policy having a face value that is not a multiple of $1,000. *Id.* Consequently, it would be unreasonable to impose the requested presumption on these Prudential transactions.

228. The Court finds that the existing ADR provisions adequately identify transactions in which life insurance was sold as an investment plan. The ADR process weighs the available evidence, including policyholder statements, available documents, and agent complaint histories. These are more accurate indicia of whether a policyholder was misled than the proposed "even premium/odd face amount" test.

229. Consequently, the Court rejects the argument that the ADR process should be replaced with the proffered "even premium/odd face amount" test.

9. The Proposed Presumptions for APP Claims Are Unnecessary and Inappropriate

230. Massachusetts argued and Beauvias argues that beginning in 1984, Prudential improperly used the "Investment Generation Approach" ("IGA") to set the dividend scales that appeared in Prudential's illustrations without fully disclosing the implications of the IGA change in the illustrations. Mass. at 13-15; Beauvias at 8-10. Massachusetts argued that the ADR should include additional evidentiary considerations to increase a policyholder's score where these illustrations were used in a sale. Mass. at 13-15. Additionally, California proposed five additional factors that it believed should be considered in evaluating claims involving APP claims. Cal. at 10-11.

231. The Court finds that the ADR process adequately addresses and remedies the damages flowing from Prudential's decision to adopt the IGA. First, if the class member was misled, the ADR scoring provisions will score the class member so that the class member will be entitled to significant relief. Second, the ADR damages formula adequately accounts for any losses stemming from Prudential's IGA. Vanishing premium scheme victims may obtain the difference between the premium payments and policy values illustrated at the time of sale and those that occurred in the wake of falling interest

rates. Stipulation of Settlement, Ex. B, at 28-31, ¶¶ III.C.1.a, III.C.2.a. To the extent that claimants were paid dividends lower than those Prudential projected at sale, thus, they may recoup the resulting damages under the ADR process. Under any measure, this is fair and adequate relief.

10. No Additional Evidentiary Considerations Are Necessary

232. As discussed above, the Proposed Settlement provides an extensive, non-exclusive list of Specific Evidentiary Considerations for each claim category. Several objectors argue that the Proposed Settlement must include additional factors. Massachusetts argues for additional Specific Evidentiary Considerations for each Claim-Specific Category.[80] Mass. at 14-16. Similarly,

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[80] In the "Abbreviated Payment/APP" claims category Massachusetts argued to include whether the agent when presenting an illustration: (1) disclosed (when applicable) that Prudential had actually decreased its dividends in one or more recent years (as was true from 1988 through 1995); (2) stated that Prudential has always met or exceeded its dividend projections; (3) explained that changes in dividends, which are not guaranteed and which are usually illustrated in a separate column, would have no effect on the out-of-pocket premiums column shown in the illustration; (4) informed the consumer that dividends are not guaranteed.

Massachusetts argued also that in the "Life Insurance Sold as an Investment" category, the specific evidentiary considerations must include whether the policyholder received a solicitation that did not mention life insurance or that referred to the product being offered as a pension plan, private pension plan, or pension maximization plan. Massachusetts also argued

California argued for the addition of several Specific Evidentiary Considerations in the Abbreviated Payment Plan category. Cal. at 10-11. The Court finds the Proposed Settlement as it is to be fair and adequate.

233. The existing lists of Specific Evidentiary Considerations, quite broad as they are, do not purport to be exclusive. They were incorporated into the agreement "to provide additional guidance to the Claim Evaluation Staff, the Claim Review Staff or the Appeals Committee, as the case may be, particularly in instances where there is an absence of Available Evidence of the alleged Misstatement, but where it appears that the Claimant was misled. . . . " Stipulation of Settlement, Ex. B, at 10, ¶ I.F. The Considerations, thus, are illustrative of the matters to be considered in assessing a claim under the Claims Resolution Factors.

234. Indeed, to catalogue each factor and consideration that could bear on a Claims Resolution Factor would be both impossible and undesirable. Those who review the claims must be given the flexibility to react to the facts as presented in determining whether a policyholder was misled.

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that "supporting evidentiary factors" must be added to the "Financed Insurance" claims category: (1) whether the new policy was issued within 180 days of cancellation of, or withdrawal of value from, the old policy; (2) whether funds were withdrawn from the old policy in the exact amount of the premium on the new policy; and (3) whether, for several years, funds were withdrawn from the old policy in amount less than the premium on the new policy.

235. Consequently, the Court rejects the assertion that the Proposed Settlement's failure to include the detailed factors provided by several objectors makes the Proposed Settlement unfair.

11. Agent Conduct Is an Appropriate Talisman of Prudential's Wrongful Conduct

236. Some objectors have argued that the Proposed Settlement's ADR process is flawed because it focuses on the agent's conduct, rather than on the conduct of Prudential management. The Court disagrees. It is completely appropriate for the ADR process to evaluate the agents' conduct, because that conduct was a conduit through which Prudential misled and injured the individual claimants. If this case were tried, the Court could find that legal presumptions were appropriate and that a focus on individual agent conduct would not be necessary. But this cognizance does not bespeak to the fairness of the ADR's approach.

12. A Presumption in Favor of the Policyholder Where the Policyholder's Statement Conflicts with an Agent's Statement Is Unnecessary and Undesirable

237. One objector seeks a presumption in favor of the policyholder where the statements of the policyholder and agent conflict. Beauvias at 19. The Court finds that this presumption is unnecessary, because the ADR guidelines contain sufficient scoring mechanisms to address the veracity of policyholder and agent statements. The

ADR Guidelines contain numerous scoring and evidentiary considerations to evaluate the veracity of policyholder and agent statements and to increase a claimant's score where the agent's credibility or conduct should be questioned, including where:

- the agent has been terminated for sales practices problems, Stipulation of Settlement, Ex. B, at 11, ¶ I.F.1.c;
- the agent has been placed on probation for sales practices problems, *Id.*;
- the agent was disciplined on more than one occasion for his sales practices, *Id.*;
- the agent was fined or sanctioned by a regulatory body for his sales practices, *Id.*;
- the agent failed to certify his statement under pains and penalties of perjury, *Id.*, Ex. C, at 6-7, ¶ II.G.2.b.;
- the agent has a Complaint History, *Id.*, Ex. B, at 9, ¶ I.D; or
- the agent has a pattern of financing activity, *Id.*, Ex. B, at 17, ¶ II.B.1.a.

The Court finds also that the requested presumption would be undesirable, because the presumption would encourage policyholders to submit claims where they were not misled; policyholders would know that only written documentation would overcome any of their allegations. Accordingly, this presumption must be rejected.

13. The Agent's Presence Before a Decision-maker is Unnecessary to Adjudicate Class Members' Claims

238. Beauvias argues that every claimant should "be entitled to have the agent appear at the examination and that the agent's failure to appear should automatically lead to an award of the highest score." Beauvias at 19. The Court disagrees. It would be unnecessary and unduly burdensome to require an agent to testify personally during the ADR process. The ADR process does not involve any live witness testimony. The process does provide that a written statement by the agent, signed under oath, should be obtained. Stipulation of Settlement, Ex. C, at 2, ¶ I.D.1. The ADR process also provides that an existing agent's refusal to cooperate is a positive consideration in assessing a policyholder's claim. *Id.*, Ex. B, at 11, ¶ I.F.1.d. The Court finds, moreover, that it would be inappropriate to penalize Prudential for the failure of individual agents to appear where these agents no longer are employed by Prudential or subject to its direction or control. Thus, these ADR procedures are adequate.

14. The Complaint History Factor is Adequate

239. A claimant automatically receives a minimum score of "2" if his or her agent has a "Complaint History." The Proposed Settlement initially defined Complaint History as three or more complaints, valid or invalid, relating to any sales practice category, that were made at any time through September 20, 1996. Stipulation of Settlement, Ex. B, at 9, ¶ I.D. The Final Enhancements to which Prudential agreed on the eve before the Fairness Hearing

extend that Complaint History cut-off date to February 1, 1997.[81] Stipulation Amendment. The cut-off date is fair.

240. Extending the cut-off date further would not be necessary or desirable for several reasons. First, the February 1, 1997 cut-off date follows almost two years of continuous and intensive media scrutiny and widespread adverse publicity, which sensitized the general public to life insurance sales practice issues in general and Prudential's in particular, and which prompted policyholders to file numerous complaints (totalling 16,912 in 1996 alone through September 20). Pru. Reply at 33; Fiandaca Decl. at ¶ 4. Second, the Complaint History is already an inflated figure because it includes both valid and invalid claims. Pru. Reply at 33. Third, all sales complaints are aggregated, even if they do not pertain to the type of claim at issue. *Id.* Fourth, the three-complaint threshold is very low because it covers complaints recorded over fourteen years. And fifth, Prudential had already agreed with plaintiffs to reduce the threshold from the six complaints specified in the Task Force Plan to three, which results in substantially more agents falling within the Complaint History category than under the Task Force Plan. *Id.*

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[81] The states that had objected to the September 20, 1996 cut-off date are in complete accord that the February 1, 1997 cut-off date is fair, reasonable, and adequate.

15. The Proposed Settlement's Method of Assembling Associated Complaints is Adequate

241. The Florida DOI contended that the Complaint History provision could not be implemented properly because Prudential's records are incomplete. Fla. DOI at 8-11. The Court finds, however, that Prudential's records amply identify complaints for Complaint History purposes. Barcafer Aff. at ¶¶ 2-3. Prudential has retrieved customer complaints from its regional and agency records, and has processed and input the data into a comprehensive database. *Id.*

242. The Florida DOI argued that Prudential's complaint records are inadequate because many complaints have not been incorporated into the "official Prudential complaint system." Fla. DOI at 9-11. This complaint is unfounded, because Associated Complaints documentation is not limited to materials in Prudential's official complaint system. Stipulation of Settlement, Ex. B, at 3, ¶ I.C. A customer complaint letter, for example, may constitute an Associated Complaint, regardless of whether the letter was filed with Prudential's headquarters. *Id.*

243. The Florida DOI cited Cressman's criticism of Prudential's Complaint resolution process for the proposition that consideration of Associated Complaints is an inadequate measure of complaints against an agent. Fla. DOI at 9-10. Because an Associated Complaint need not be resolved in favor of the policyholder to be considered, however, the Florida DOI argument is without merit.

244. Additionally, the Florida DOI argued that the measure of Associated Complaints is inadequate, because there is an inability to identify pre-1989 misconduct and a significant portion of the original pre-1992 complaint records have been destroyed. Fla. DOI at 10-11. Prudential insists, however, that its regional databases date back to 1985 or 1987, Barcafer Aff. ¶ 2, and that all records were entered into its computerized system before destroying them, Hebel Supp Aff. ¶ 34. And, despite plaintiffs' extensive investigation into Prudential's document destruction, plaintiffs have encountered no evidence that pertinent complaint records have been irretrievably lost or destroyed. Pls. Settl. Reply at 52 n. 51.

245. The Florida DOI argued also that early complaint logs do not describe complaints in a manner consistent with the claim-specific categories and that the inability to categorize these complaints will understate the number of complaints. Fla. DOI at 10-11. This criticism is unwarranted, however, because Prudential has agreed to count all claims against a particular agent regardless of whether they relate to a specific category.

16. Class Members Need Not Be Informed of Agents' Complaint Histories Prior to Choosing Relief

246. The Texas DOI argued that prior to being required to choose between the ADR process and Basic Claim Relief, each participant should be informed of

whether his or her agent has a Complaint History.[82] Tex. at 5. The Court disagrees entirely. It is not necessary to disseminate the Complaint History information before the election period for policyholders to make informed decisions about whether to choose between the ADR process and Basic Claim Relief. Policyholders will know whether they were misled without Complaint History information because they have personal knowledge of the sale and of the operation of their policies. Additionally, to distribute the list before the election period would create an inappropriate *de facto* presumption that class members who bought policies from an agent with a Complaint History were misled. The presumption is inappropriate, of course, because not all class members who bought policies from agents with Complaint Histories were misled.

17. Unauthorized Execution as a Positive Consideration is Adequately Described and Effective

247. California argued that the Proposed Settlement inadequately defines "unauthorized execution" as a positive consideration and California proffered detailed criteria to determine whether signatures are unauthorized. Cal. at 9-10. California argued also that the ADR guidelines should award an automatic "3" where a forgery is

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[82] In fact, the Texas DOI moved for this Court to enforce a *Subpoena Duces Tecum* to require Prudential to produce a list of Texas agents whom Prudential identified as having three or more sales related complaints as of September 30, 1996. The Court denied the request in its Order of January 24, 1997.

discovered in connection with a claim involving life insurance sold as an investment. *Id.* at 10. It appears that California's request for an automatic "3" was resolved by one of Prudential's concessions in the Final Enhancements: Prudential agreed to add language to the Proposed Settlement to allow an automatic "3" for a forgery on any life insurance application. Stipulation Amendment at ¶ 4.

248. And the Court disagrees with the argument that additional criteria are necessary to determine whether there has been a forgery, and finds that the ADR guidelines in this respect are fair, reasonable, and adequate. The ADR guidelines provide that the score initially given a claim may be increased by one point if the agent executed the policyholder's signature on any transaction document without authorization. Stipulation of Settlement, Ex. B, at 10, ¶ I.F.1.a. The Court does not believe that California's detailed criteria are necessary for a claim evaluator to determine whether a signature is unauthorized. The purpose of the positive considerations is to allow the claims evaluators to compensate a class member for being misled where there is an absence of available evidence:

> The Positive Considerations and the Negative Considerations are to be reviewed in light of the totality of the facts and circumstances pertaining to the particular Claim. They are to provide additional guidance to the Claim Evaluation Staff, the Claim Review Staff or the Appeals Committee, as the case may be, particularly in instances where there is an absence of Available Evidence of the alleged Misstatement, but where it appears that the Claimant was misled as to

> any one or more of the itemized Claim Resolution Factors herein.

Stipulation of Settlement, Ex. B, at 10, ¶ I.F. The Court finds that the ADR criteria are adequate to allow a claim evaluator to determine whether a signature has been forged.[83]

18. The ADR Process Fairly Addresses Document Destruction

249. Krell argues that the Proposed Settlement's document destruction provision does not apply to class members who would need the provision most. Krell Brief at 83-86. To prove his theory, Krell presents a hypothetical claim that he argues demonstrates the inability of a claimant to score a "3" where there has been document destruction. *Id.* A close look at Krell's hypothetical reveals its flaws and Krell's faulty conclusions.

250. Krell hypothesizes that where (1) a class member relied on misstatements contained in company documentation; (2) the class member was shown the company documentation by an agent with a Complaint History; (3) it is clear that Prudential destroyed the documentation;

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[83] Indeed, the ADR allows forgery to be considered as a factor whenever the policyholder indicates that a document was forged. The ADR process enables any policyholder who does not initially receive a score of "3" to appeal the decision and receive and review a copy of his or her Claim File. Stipulation of Settlement, Ex. C, at 20, ¶ V.B.3. The policyholder can then challenge any purportedly forged document that he or she had not seen before.

and (4) the agent denies that he or she misled the policyholder, the class member would never score more than a "2." *Id.* at 84.

251. Krell's conclusion is wrong: Krell's hypothetical class member would receive a "3" under either the original or the enhanced document destruction provisions. Under the original document destruction provision, the hypothetical class member would provisionally receive a score of "2" because the balance of available evidence, which includes the Claim Form, supports the claim.[84] The score would then be adjusted to a "3" based on the presence of any "positive considerations," which specifically include the destruction of company documentation. Stipulation of Settlement, Ex. B, at 11, ¶ I.F.1.g. Thus, the class member in Krell's hypothetical could very

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[84] The ADR does limit the ability to enhance a score by reason of document destruction where the only reason that the class member is initially scored a "2" is because of the Complaint History presumption. Where the evidence on balance does not indicate that the policyholder was misled, thus, the policyholder would not be enhanced from a "2" to a "3" by evidence of document destruction. The limitation is reasonable, a great percentage of the class may be entitled to an automatic "2" by reason of the Complaint History presumption. Stacking an additional presumption, such as a document destruction presumption, would afford full relief to policyholders who were never misled.

This limitation on the ability of a claimant to obtain stacked presumptions does not affect Krell's hypothetical claimant, who has scored a "2" by virtue of the fact that the evidence on balance indicates that she or he was misled.

well obtain a "3." Moreover, under the enhanced document destruction provisions, the hypothetical policyholder certainly scores a "3" because the documents that Krell hypothesized are clearly material to the claim under review and would have a known impact on the class member's file (because the class member relied on them at the time of sale).[85]

19. Policyholders Receive Adequate Representation in the ADR Process

252. One objector argues that the ADR Process does not provide for enough policyholder representatives. Beauvias at 22-23. The Court finds that the ADR process provides adequate policyholder representation, with direct assistance to the claimant at every stage of the process. The ADR process provides a Claimant Representative to monitor and oversee the ADR Process. Stipulation of Settlement, Ex. C, at 13-14, ¶ IV.A. The Claimant Representative may discuss individual claims with and make recommendations to the Claim Team, the Claim

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[85] The Florida AG asserted that several incidents of document destruction allegedly occurring in Florida resulted in the destruction of material documents. Fla. AG Supp. at 4-10. If substantiated, any claimant impacted by the document destruction that occurred in the Jacksonville Marketing Division, or any other Florida location, will receive adequate relief as provided in this Court's Order of February 3, 1997. That Order requires a document destruction audit of all Prudential field offices by an independent auditor to be paid solely by Prudential and at no cost to the class. Through this audit process, all incidents of document destruction occurring in any state will be investigated and affected files will be scored appropriately in the ADR process.

Review Staff, or the Representatives. *Id.* The ADR process also provides the Claimant Support Team to help policyholders learn about the ADR Process and how to submit claims. *Id.* Ex. C, at 4, ¶ II.D. The ADR process provides the Claim Review Staff to respond to policyholder inquiries and advise policyholders regarding the processing and administration of their claims. *Id.*, Ex. C, at 12-13, ¶ III.A. And, if the claimant is dissatisfied with the remedy offered, he or she can pursue an appeal with the direct assistance of a policyholder representative (who is not the same individual as the Claimant Representative(s)). *Id.*, Ex. C, at 19, ¶ V.B.2.

20. The Time Periods Allocated to Each Step in the ADR Process Are Fair, Reasonable, and Adequate

253. Beauvias argues that the time periods between steps of the ADR process are too short, to Prudential's benefit. Beauvias at 22. Beauvias recommends each step be extended by between three and six months. *Id.* The Court disagrees with Beauvias' suggestion, because the time frames presently incorporated in the settlement strike a balance between providing policyholders with sufficient time to pursue the ADR process and providing policyholders a swift recovery.

254. In November of 1996, policyholders received an extensive package of information describing in detail the Proposed Settlement, the Task Force Plan, the enhancements included in the Proposed Settlement, and the types of claims and remedies included in the remediation plan. Stipulation of Settlement, Exs. F-1 to F-3; Meade

Aff. at ¶ 11. Prudential mailed additional packets to policyholders in 46 jurisdictions around February 1, 1997, to implement the Task Force Plan and describe the status of the Proposed Settlement. Fiandaca Decl. at ¶ 9. Each Policyholder will have at least two and a half months (seventy-five days) simply to choose between filing an ADR claim and obtaining Basic Claim Relief and, if so, to return an Election Form. Stipulation of Settlement, Ex. C, at 9, ¶ II.I.2.b(i). In addition, policyholders in the forty-six jurisdictions that adopted the Task Force Remediation Program have already received the February notice and have until June 1, 1997 to make an election. Ashinoff Supp. Aff. at ¶ 3. Thus, these policyholders will have up to four months to make this decision. And, if a policyholder elects to file an ADR claim, he or she will then have up to three months to fill out a Claim Form. Stipulation of Settlement, Ex. C, at 9, ¶ II.I.2.b(i). The Court finds that allotting class members between two to four months to fill out the Election Form and three months to fill out the Claim Form is fair, reasonable, and adequate under the circumstances.

21. The ADR Procedures Properly Consider as Undermining Evidence that a Class Member Received a Clear Written Disclaimer at the Time of Sale

255. Massachusetts argues that the ADR incongruously allows scorers to rely on the disclaimers often printed on the last page of illustrations as "undermining evidence" but does not directly allow scorers to consider the first page of illustrations, which shows that premiums will become "$0" as "supporting evidence." Mass. at

12-13. Under the ADR Guidelines, however, if a policyholder received sales materials that stated clearly that dividends, investment returns, or interest crediting rates are not guaranteed and may change over time, or that described the operation of the APP, that evidence is considered undermining evidence where the statement was not solely that dividends were "not guaranteed" or "non-guaranteed." Stipulation of Settlement, Ex. B., at 9, ¶ I.D.

22. This Court's Role in Allocating the Additional Remediation Amount Is Appropriate and Does Not Undermine the Ability of Class Members to Evaluate the Proposed Settlement's Fairness

256. Objectors have argued that it is impossible to evaluate the settlement fairness without advance notice of the manner in which the Additional Remediation Amount will be allocated. The Court disagrees. Most of the Proposed Settlement benefits are clearly described. The Court's discretion to disperse the Additional Remediation Amount within the parameters defined by the Proposed Settlement does not undermine the ability of a class member to choose a form of relief. Stipulation of Settlement, Ex. B, at 39, ¶ VI ("After the ADR process completion, the Court shall determine, at a hearing and upon notice, the method and allocation of the distribution of the Additional Remediation Amount among Claimants receiving relief in the ADR Process.").

23. Basic Claim Relief Is a Valuable Remedy

257. The Court rejects several objectors' concerns that Basic Claim Relief has no value. Plaintiffs' expert, Robert L. Hoyer, projected that the Basic Claim Relief will provide benefits valued at nearly $800 million. Hoyer Aff. at ¶¶ 6, 16, and Exs. F1-F3, G1-G5, H1-H3. The Court rejects also the argument that if the cost of Basic Claim Relief to Prudential is low, then Basic Claim Relief is worthless to policyholders. The cost of the relief to Prudential is not the measure of class member benefit. The value of the relief to the Class, which may be substantial, is what matters. *See New York Life*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652, at *60 (class members benefitted from settlement regardless of cost to defendant). The Court finds Basic Claim Relief will provide substantial value to policyholders who choose not to participate in the ADR process.

258. The Court rejects also the novel contention that Basic Claim Relief is inadequate because class members must continue to do business with Prudential or because Basic Claim Relief is merely a marketing tool for Prudential. Objectors who prefer not to do business with Prudential may elect the ADR process or choose the Basic Claim Relief Mutual Fund Enhancement option. Similarly, those objectors who feel that Optional Premium Loans and Enhanced Value Policies create unacceptable risks may simply elect other forms of relief. The availability of these choices exemplifies the fairness of the Proposed Settlement in providing individually tailored relief to the entire Class.

259. Additionally, the Court declines to follow the demands of Beauvias and others, who would prefer that claimants receive cash or other relief. The cash alternatives demanded by these objecting class members are available through the ADR process to those that satisfy the criteria of that process. Furthermore the desire of some class members for cash relief does not indicate that the Proposed Settlement's relief is inadequate. *See New York Life*, 1995 N.Y. Misc. LEXIS 652, at *54.

260. The Court also rejects sundry objections to specific Basic Claim Relief provisions. For example, Johnson argues that the Optional Premium Loans ("OPL") offer nothing because policyholders can already obtain a loan against their policies at reduced rates. Johnson, Ex. 1 at 3. The interest rates offered on OPLs, however, are significantly lower than the rates policyholders would pay under their policies. Hangstrom Supp. Aff. at ¶ 4. As the Task Force noted, "[f]or policyholders who are experiencing a financial difficulty in meeting current premiums but do not feel they were misled, the Optional Premium Loans offer assistance." Task Force Report at 193.

261. And Beauvias argues that OPLs may injure policyholders by putting them deeper into debt. Beauvias at 15-16. The Court disagrees. Because OPLs are available only to maintain existing coverage, there is little risk of increasing burdensome debt, and these loans may enable policyholders to maintain their desired coverage.

262. Johnson complains that Enhanced Value Policies ("EVP") cannot be purchased with loans or rollovers from other policies. Johnson, Ex. 1, at 4. The EVP provides additional permanent death benefit coverage at no

cost to the policyholder. Stipulation of Settlement, Ex. D, at 5, ¶ III. The additional insurance is paid-up, has its own cash value, and will earn dividends. The Proposed Settlement does not permit loans and rollovers so as not to encourage policyholders who already have heavily loaned policies to buy additional insurance that they cannot afford. The Court does not find that the provision is unfair.

263. Finally, Oscher had contended that Basic Claim Relief is designed to finance the cost of the ADR Program. Oscher Aff., Executive Summary, at 2-3. The products offered under Basic Claim Relief are either minimally profitable or unprofitable. Hangstrom Supp. Aff. at ¶ 3. Prudential's expert anticipates that Basic Claim Relief will be a break-even proposition for the company, at best. *Id.* Moreover, any profit on Basic Claim Relief will be more than offset by the administrative costs of the Proposed Settlement, including its Basic Claim Relief component. *Id.*

24. The Settlement Does Not Discriminate Against Policyholders Who Cannot or Desire Not to Purchase Basic Claim Relief

264. Several objectors conclusorily argue that the Proposed Settlement discriminates against policyholders who cannot afford class relief and policyholders who cannot meet the underwriting requirements of certain types of Basic Claim Relief. The Settlement in its entirety provides adequate relief to the class as a whole. Policyholders who cannot afford some Basic Claim Relief options, who cannot avail themselves of options because

they do not meet certain underwriting requirements, or who do not desire to avail themselves of these options may choose to avail themselves of other available Basic Claim Relief options. And, more importantly, the ADR process is available to those who feel that they were misled. The Proposed Settlement does not discriminate against any policyholders at the expense of others.

25. The Proposed Release Is Fair and Appropriate

265. Krell argues that the release is too broad, because it releases claims not pleaded in the Second Amended Complaint, but cites no authority to support the argument. Krell Brief at 36-39. And the Court disagrees with Krell's argument. First, even if there were a requirement that the release correspond to the Complaint, the requirement would be satisfied. The Complaint involves allegations relating to all wrongful conduct in the sale and treatment of life insurance policies. The release fairly corresponds to the allegations in the Complaint and to the relief provided by the Proposed Settlement. Second, two recent cases in the Third Circuit hold that releases may include all claims, including unpleaded claims that arise out of the same conduct alleged in the case. *See Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1562-64 (3d Cir.), *cert. denied*, 513 U.S. 986, 115 S.Ct. 480, 130 L.Ed.2d 393 (1994); *Sandler Assocs., L.P. v. Bellsouth Corp.*, 818 F.Supp. 695, 704-05 (D.Del.1993), *aff'd*, 26 F.3d 123 (3d Cir.1994); *accord Matsushita Elec. Indus. Co. v. Epstein*, ___ U.S. ___, ___, 116 S.Ct. 873, 883, 134 L.Ed.2d 6 (1996). Third, class members who did not wish to be

bound by the release, could have opted out of the class. *See New York Life*, 1995 N.Y. Misc. LEXIS 652, at *70-71. For these reasons, the objection is meritless.

266. Krell also incorrectly argues that releases improperly cover class members without current, cognizable claims against Prudential. Krell Brief at 39. Krell contends that because these class members have no justiciable case or controversy, their claims cannot be released. *Id.* The Court is not persuaded. Whether an individual class member has been damaged and has a cognizable claim is always uncertain, litigants often settle claims whose existence is uncertain, and the uncertainty of a claim does not bear on whether a case or controversy exists. *See In re Asbestos Litig.*, 90 F.3d 963, 987 (5th Cir.1996) (objection to class settlement on ground that it purported to release claims not presenting a case or controversy was mistaken; settlement did not purport to make a determination of "the validity or amount of individual personal injury claims" against defendant), *petition for cert. filed*, No. 96-1379 (Feb. 27, 1997). Class actions routinely include members who may or may not have suffered individualized damage. *See, e.g., Weiss v. Mercedes-Benz*, 899 F.Supp. at 1298-99 (class of all who purchased a 1992 or 1993 Mercedes); *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 164 F.R.D. 362, 366 (S.D.N.Y.) (class of all purchasers of securities in question), *aff'd*, 107 F.3d 4, 1996 WL 739258 (2d Cir.1996). Additionally, all class members have received adequate consideration for the releases – each class member has the right to participate in Basic Claim Relief or the ADR Process.

267. Beauvias incorrectly argues that the release is not valid because "non-recovering" policyholders will

receive no consideration for releasing their claims. Beauvias at 11. The settlement is designed to compensate all policyholders who were misled in purchasing financed insurance. That compensation undeniably constitutes consideration for the release of claims. Additionally, the consideration for the release includes the right of every class member to participate in the ADR Process or to obtain Basic Claim Relief. *See, e.g., DiMartino v. City of Hartford*, 636 F.Supp. 1241, 1249-50 (D.Conn.1986) (finding participation in testing process to constitute adequate consideration).

268. The Court rejects also Beauvias' objection to the release of claims against Prudential officers, directors, and agents. The need for finality on Prudential's part requires that any settlement include a release also as to individuals. A settlement with Prudential alone would lack finality because if dissatisfied policyholders sued Prudential agents, the agents would likely turn to Prudential for indemnity or contribution. *See, e.g., New York Life*, 1995 N.Y. Misc. LEXIS 652, at *71. Additionally, some former Prudential officers are named defendants here. The Court finds that the release of the individual parties is appropriate and does not render the Proposed Settlement unfair.

26. There Is No Basis to Appoint a Custodial Receiver or Special Fiscal Agent

269. Treadway has argued that the Court should appoint for Prudential a receiver or a fiscal agent, but has failed to demonstrate sufficient legal basis for his argument. Treadway argues that the Court should appoint an

independent individual to administer the remediation program because there has been fraudulent mismanagement and a gross abuse of trust. Treadway Supp. at 2, 11-12.

270. To appoint a receiver is not a decision that courts take lightly, however. For example, the Second Circuit has held that the appointment of a receiver is an option to be exercised only sparingly. *See Donovan v. Bierwirth*, 680 F.2d 263, 276 (2d Cir.) ("the appointment of a receiver is a harsh remedy, not to be imposed without a showing of necessity"), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982). Treadway has cited cases in which courts have appointed receivers where management's chronic fraud necessitated the ouster of corporate management or the preservation of assets for the benefit of investors or creditors; *see also, S.E.C. v. Bowler*, 427 F.2d 190, 190 (4th Cir.1970) ("A receiver is . . . appropriate where necessary to protect the public interest and where it is obvious . . . that those who have inflicted serious detriment in the past must be ousted."); *S.E.C. v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir.1963) (appointing trustee-receiver where corporation illegally operated as an unregistered investment company); *Leone Indus. v. Associated Packaging, Inc.*, 795 F.Supp. 117, 120 (D.N.J.1992) (observing that as a general rule "receivers are appointed only when the party seeking receivership has 'an equitable interest in the property to be seized or . . . judgments that cannot otherwise be satisfied' ").

271. Courts are also reluctant to appoint fiscal agents. Fiscal agents are generally appointed to monitor corporate record keeping or to prevent the erosion of assets on behalf of shareholders. *See, e.g., S.E.C. v. Alan F.*

Hughes, Inc., 461 F.2d 974 (2d Cir.1972) (appointing special fiscal agent to review corporate books and to report need for receiver to dissolve corporation); *Ferguson v. Birrell*, 190 F.Supp. 506, 511 (S.D.N.Y.1961) (appointing fiscal agent to determine the propriety of corporate disbursements).

272. Here, there is no evidence of any managerial problem at Prudential that would suggest the need for a receiver or fiscal agent; to the contrary, the Task Force concluded that Prudential's current sales program, designed to prevent a repeat of past mistakes, is an industry "model." Task Force Report at 216-18. Moreover, there is abundant evidence that the Proposed Settlement is designed to provide and will provide independent and objective remediation to class members. As discussed above, the Proposed Settlement provides extensive procedural safeguards to ensure that the Proposed Settlement is implemented as intended by Class Counsel and state regulators, and as Prudential agreed. These observations in conjunction with the lack of any persuasive argument by Treadway, cause the Court to decline to appoint the requested custodial receiver or special fiscal agent.

27. The Proposed Settlement Does Not Violate State Law

273. Krell argues that the Proposed Settlement violates four types of state laws enacted for the purpose of regulating insurance: (1) regulations governing insurance advertising; (2) prohibitions on the mandatory arbitration of contractual insurance claims; (3) regulations governing the readability of insurance policies and forms; and (4)

regulations governing the replacement of insurance policies. Krell Brief at 47-56. The Court finds that the Proposed Settlement does not violate state law, and the Court derives substantial comfort in its conclusions from the observation that insurance regulators of all fifty states have approved the Proposed Settlement as being in compliance with their laws.

274. Krell incorrectly argues that the Settlement Agreement and the Class Notice "advertise" life insurance. Krell Brief at 47-48. But, the definition of "advertisement" under the model rule that Krell cites, expressly excludes "[c]ommunications with policyholders other than material *urging* policyholders to purchase, increase, modify, reinstate or retain a policy." Krell Brief, Ex. B, National Association of Insurance Commissioners, Governing the Advertising of Life Insurance § 2A(2)(b). And the Class Notice and Proposed Settlement do not *urge* policyholders to purchase insurance policies. Rather, these communications inform the policyholders of their rights as class members and their rights under the Proposed Settlement. Because the Settlement Agreement and Class Notice are clearly not "advertisements," but litigation documents designed to inform policyholders of their rights in these proceedings, the regulations governing insurance advertising simply do not apply.

275. Krell incorrectly argues also that the Proposed Settlement violates state law prohibitions on the arbitration of insurance claims. Krell Brief at 49. Krell argues that the Proposed Settlement's ADR procedures violate several state laws that exempt insurance contracts from the general rule that contractual agreements to arbitrate disputes are valid, binding, and irrevocable. Krell Brief at

49 and n. 23. The argument fails because the ADR procedures do not constitute "arbitration" agreements. Here, unlike under a mandatory arbitration clause, policyholders choose whether to participate in the Proposed Settlement and then choose whether to participate in the ADR process. The ADR process is completely voluntary, while a contractual arbitration clause completely forecloses other remedies. There is no legitimate comparison.

276. Also, Krell argues incorrectly that the Proposed Settlement and the Class Notice violate state laws governing the form, content, and readability of life insurance contracts and policy forms. Krell Brief at 50-54. The Proposed Settlement and the Class Notice are not life insurance contracts or policy forms and do not violate state laws pertaining to those documents. The Proposed Settlement is what it purports to be, a settlement. The Class Notice is a notice to the class about the pendency of this class action and the terms of the Proposed Settlement. Moreover, none of the regulators of the fifty states that have approved the settlement has expressed or embraced Krell's concerns. The Court finds that state laws governing the form, content, and readability of life insurance contracts and policy forms do not apply.

28. The McCarran Ferguson Act Does Not Apply to the Proposed Settlement, Which Does Not Affect Policyholders' State Substantive State Law Rights

277. Krell argues that the Proposed Settlement violates the McCarran-Ferguson Act[86] because Rule 23(e) is an Act of Congress that here operates to "invalidate, impair or supersede" state laws "enacted for the purpose of regulating the business of insurance." Krell Brief at 56-58. This argument is absurd in this context. Even if the Federal Rules of Civil Procedure were an "Act of Congress," which they are not,[87] a consensual settlement between parties to a lawsuit could not *invalidate, impair,* or *supersede* substantive state laws. Indeed, the Proposed Settlement does not go so far as to *violate* state laws, as discussed above, let alone to *supersede* them.

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[86] The McCarran-Ferguson Act provides in pertinent part:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically related to the business of insurance. . . .

15 U.S.C. § 1012.

[87] The Supreme Court transmits the Rules to Congress and they become effective if Congress takes no action.

29. The Rules Enabling Act Does Not Apply to the Proposed Settlement, Which Does Not Affect Policyholders' State Substantive State Law Rights

278. Krell argues that the Court's approval of the Proposed Settlement would violate also the Rules Enabling Act,[88] because the Proposed Settlement would modify or abridge state law rights. Krell Brief at 56-57. Federal Rule of Civil Procedure 23(e) does not, however, "abridge, enlarge or modify" any substantive rights. The Rule requires that the district court approve any settlement between the parties to a class action. *See* Fed.R.Civ.P. 23(e). In other words, if the parties agree to compromise their rights, they must, thereafter, seek court approval. A court's approval of a voluntary settlement, by nature a compromise of rights, does not affect substantive state rights. The Court's act merely recognizes the parties' voluntary compromise of their rights. The requirement that the court must approve any settlement in the class action context, thus, does not abridge, enlarge, or modify any substantive rights.

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[88] The Rules Enabling Act provides in pertinent part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. . . .

28 U.S.C. § 2072.

30. This Court Properly Preliminarily Certified the Class for Settlement Purposes Only

279. This Court's procedures in preliminarily certifying the class for settlement purposes were completely proper. According to the *Manual on Complex Litigation*, this Court's procedures have been completely appropriate:

> Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation. In some cases this initial evaluation can be made on the basis of information already known to the court, supplemented as necessary by briefs, motions, or informal presentation by the settling parties.

§ 30.4 at 236-37. The Court has discretion to hear from counsel, the parties, and from attorneys who did not participate in the negotiations. *See id.* But, the Court is not required to do so. This Court clearly had an adequate record to make the determination of preliminary approval without holding a hearing.

280. Krell complains that on October 28, 1996 this Court signed an order conditionally certifying the class for settlement purposes without holding a formal hearing. Krell also complains that the Court that day participated in an improper *ex parte* conference. Despite Krell's unfounded contentions that a conference occurred, there was no conference on that date. Rather, counsel delivered

the Stipulation of Settlement and accompanying documents, and the Court later signed its Order.[89]

31. The Fairness Hearing Format Was Fair

a. The Opt-Out and Objection Period Was Sufficient

281. Several objectors have contended that the December 19, 1996 opt-out deadline was scheduled too soon after the policyholders received the Class Notice. The Court disagrees. Courts have routinely approved of deadlines of between thirty and sixty days. *See White v. National Football League*, 41 F.3d 402, 408 (8th Cir.1994), (finding that notice mailed "approximately one month prior to the first settlement hearing" was adequate notice), *cert. denied*, 512 U.S. 1220, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993) (finding that notice mailed thirty-one days before deadline for objections and forty-five days prior to hearing was timely), *cert. denied*, 512 U.S. 1220, 114 S.Ct. 2707, 129 L.Ed.2d 834 (1994); *Marshall*, 550 F.2d at 1178 (finding that notice mailed twenty-six days before deadline for opting out of settlement was adequate); *Milstein v. Werner*, 57 F.R.D. 515, 518 (S.D.N.Y.1972) (notice mailed thirty-eight days before

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[89] Throughout these proceedings, Krell's counsel, Michael Malakoff, has falsely accused this Court of participating in improper conferences in an effort to undermine the Proposed Settlement. His efforts are at best unprofessional. At the conclusion of these proceedings, the Court will address Mr. Malakoff's aberrant conduct. *See* December 13, 1996 Tr. (explaining context of allegedly improper *ex parte* conferences).

scheduled settlement hearing was adequate); *see also generally* 2 *Newberg* § 8.37, at 8-118 (observing that the bulk of notices incorporate intervals of between thirty and sixty days between the mailing or publishing of class notice and the deadline for the recipient to respond). In the present case, Class Notice was mailed by November 3, 1996 and objections and opt-outs were due by December 19, 1996. Thus, class members had approximately forty-five days to opt out of the class after receiving the Class Notice. This amount of time is unquestionably sufficient.

b. Objectors Had Sufficient Opportunity to Conduct Discovery to Prepare for the Fairness Hearing

282. Krell wrongfully argues in his Supplemental Objection and supporting documents that his inability to complete discovery prejudiced his ability to participate in the Fairness Hearing. But, objectors have no absolute right to take independent discovery to prepare for a fairness hearing. *See Bell Atl. Corp.*, 2 F.3d at 1314-15. An objector is entitled to establish a record, but the Court has discretion to employ the procedures that it perceives will best permit it to evaluate the fairness of the settlement. Krell's contention that he was entitled to additional discovery must be rejected for several reasons.

283. First, Krell has had ample opportunity to review the discovery obtained by Plaintiffs' Counsel, *see generally* Weprin Aff. and attachs., yet Krell failed to use that discovery; Krell's counsel appears to have spent only three days reviewing discovery in the depository. Weprin

Aff. at ¶¶ 7-8; *see also Bell Atl. Corp.*, 2 F.3d at 1314-15 (objector's request for discovery denied where objector participated in action before Class Notice was sent and objector had adequate access to discovery generated by plaintiffs); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463-64 n. 9 (2d Cir.1974) (denying discovery where objectors' counsel had spent just four days in the document depository).

284. Second, Krell had sufficient time to respond.[90] Over two months transpired between the initial Class Notice and the date that all supplemental objections were to be submitted and no other class member has claimed that this ample time frame was inadequate. Krell managed to supply the Court with initial objections, with supplemental objections, and filed scads of baseless motions and affidavits in the interim.[91] Krell's counsel chose to dedicate his attention to filing a series of emergent motions and to preparing counsel and paralegal affidavits, rather than to pursuing the discovery available in plaintiffs' warehouses or to retaining experts to evaluate the adequacy of the Proposed Settlement. The Court will not delay relief to the Class, because of Krell's case management peculiarities.

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[90] Krell was in a great position to develop an evidentiary record because, unlike most objectors who remain unaware of the underlying litigation and proposed settlement until receipt of the Class Notice, *see Bell Atl. Corp.*, 2 F.3d at 1315, Krell has participated in these proceedings for over a year.

[91] Krell's counsel Michael Malakoff filed at least fifteen "emergency" motions between the issuance of the Class Notice and the date of the Fairness Hearing.

285. Third, Krell's objection that he lacked sufficient time to act is belied by the activities of other objectors. For instance, the Jewell & Moser firm had sufficient time to use the depository to review the records of 171 different clients, and to determine that the Proposed Settlement was fair, reasonable, and adequate. And the Florida AG (prior to withdrawing its objections) had time to commission and complete two extensive expert reports.

286. Fourth, Krell focuses on legal issues, the development of which would not be facilitated by additional discovery. *See Weinberger v. Kendrick*, 698 F.2d 61, 79 (2d Cir.1982) (no discovery for objector who does not present "cogent factual objections to the settlement"), *cert. denied*, 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983). Krell attacks, for example, whether a nationwide class is appropriate, whether the requirements of Rule 23 have been met, and whether the Settlement is fair and reasonable.

c. Objectors Had No Absolute Right to Present and Cross Examine Witnesses at the Fairness Hearing, and Under the Circumstances, These Activities Were Inappropriate

287. At a hearing on December 30, 1996, Krell's counsel stated that he wished to present the testimony of John Cressman and to cross-examine Prudential's experts at the Fairness Hearing. December 30, 1996 Tr. at 30-31. Krell argues that the Court's refusal to allow testimony and cross-examination at the Fairness Hearing made the hearing unfair. The Court disagrees. *See generally Walsh v.*

Great Atl. and Pac., 726 F.2d at 956 (denying an evidentiary hearing because the facts were largely undisputed, the fairness of the settlement depended primarily upon an evaluation of the competing legal positions of the parties, and it was difficult to imagine what value an evidentiary hearing would have had).

288. As the Court has noted, the Cressman testimony was already before the Court. December 30, 1996 Tr. at 31. And having experts testify would be redundant and wasteful of the Court's time because experts ordinarily testify in accordance with their written reports. *Id.* at 30. The Court suggested that objectors who wished to challenge the parties' experts file their own expert affidavits. *Id.* at 29. Krell had access to everything that the parties' experts reviewed in forming their conclusions, and Krell could have, but did not, retain an expert to review these materials and submit a contrary affidavit.

d. Krell and All Objectors Were Afforded an Adequate Opportunity to Present All of Their Factual and Legal Arguments

289. At the Fairness Hearing, Krell's counsel and all objectors' counsel were afforded thirty minutes for oral argument. Moreover, in advance of the Fairness Hearing the Court granted Krell's application for the filing of an oversized brief. Whatever arguments Krell and any other objectors deemed important were placed before the Court through both their written and oral submissions.

290. The Court allotted three full days for the Fairness Hearing and provided closed-circuit live video feed

at four remote locations within the courthouse complex to accommodate an overflow of interested parties. The Fairness Hearing concluded on the first day allotted and only one remote location was partially filled. Because all objectors were permitted to observe and be heard, the Court is satisfied that the Fairness Hearing was what it purported to be: fair.

CONCLUSION

When Edmund Burke, the Irish statesman, orator, and author, said "[T]he only thing necessary for the triumph of evil is for enough good men to do nothing,"[92] he did not have The Prudential Insurance Company of America in mind. Yet, through deceptive sales practices, harm resulted. What distinguishes Burke's admonition from the facts of this case is that good people, including Prudential, have done something and, through regulatory and judicial processes, have stemmed the tide of harm.

Through this Opinion, the Court has explicitly demonstrated that the settlement is exceptionally fair, reasonable, and adequate, far exceeding the requirements of Federal Rule of Civil Procedure 23. While some, but only a few, naysayers object to this settlement in pursuit of their own parochial interests, the settlement, when viewed through the prism of reality, provides sufficient judicial comfort to merit the imprimatur of the Court.[93]

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[92] Letter to William Smith in Familiar Quotations (John Bartlett ed. 1968).

[93] I wish to acknowledge the cooperative efforts contributed to the writing and issuance of this Opinion. In

An appropriate Order is attached.

FINAL ORDER AND JUDGMENT

Based upon the submissions of the parties referenced above and the full record before this Court, and upon this Court's Findings of Fact and Conclusions of Law as set forth above,

It is on this 17th day of March, 1997

ORDERED as follows:

1. This Final Order and Judgment incorporates herein and makes a part hereof (i) the Stipulation of Settlement, and the release included therein, dated October 28, 1996, as amended as of February 22, 1997 (together, the "Stipulation of Settlement"), (ii) Exhibit B (Prudential Alternative Dispute Resolution Guidelines), Exhibit C (Manual of Procedures for Resolving Claims Under Prudential Alternative Dispute Resolution Guidelines), Exhibit D (Guidelines for Prudential Basic Claim Relief), Exhibit E (Hearing Order), Exhibit F (Cover Letter to Class Notice; Class Notice; Questions and Answers), Exhibit G (Summary Notice), Exhibit H (Claim Form), Exhibit I (Stipulation of Confidentiality) to the Stipulation of Settlement, (iii) this Court's January 24, 1997 Order denying Texas' motion to enforce its November 5, 1996

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particular, I recognize my law clerk, Sabrena Silver, for her perspicacity, dedicated effort, and personal sacrifice. Likewise, I thank interns, Monique Hoogenboom and Todd Julian. Lastly, to my secretary of long standing, Barbara Vorob, your unparalleled patience and attention to detail breathed life into a succession of words.

subpoena duces tecum, and (iv) this Court's February 3, 1997 Order regarding document destruction guidelines; *provided*, however, that the parties are hereby authorized to agree to and adopt such amendments and modifications to the Stipulation of Settlement and its implementing documents (including, without limitation, the Post-Settlement Notice materials and the ADR Manual) as (i) shall be consistent in all material respects with this Final Order and Judgment, (ii) do not limit the rights of class members, or (iii) permit for early implementation of the terms of the Settlement at the sole option of Prudential.

2. A class for settlement purposes in accordance with *In re General Motors Corp.*, 55 F.3d 768 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995), is hereby finally certified, consisting of: all persons who own or owned at termination an individual permanent whole life insurance policy issued by Prudential or any of its United States life insurance subsidiaries during the Class Period of January 1, 1982 through December 31, 1995 (the "Policy" or "Policies"), except as specifically described below ("Policyholders"), and have not timely excluded themselves from participating in the Settlement ("class members" or the "class"). The Policyholders do not include the following persons or entities (unless such persons or entities are policyholders by virtue of their ownership interest in other Policies): (i) policyowners who were represented by counsel at the time they executed a document in connection with a settlement of a claim, action, lawsuit or proceeding, pending or threatened, that released Prudential with respect to such Policies; (ii) policyowners that are corporations, banks, trusts

or non-natural entities, that purchased policies as corporate or trust-owned life insurance under which *either* (a) there are fifty or more separate insured individuals, or (b) the aggregate premium paid over an eight-year period, ending with the close of 1996 exceeds one million dollars; or (iii) policyowners who were issued policies in 1995 by Prudential Select Life Insurance Company of America. A list of those persons who have timely excluded their policies from the class has been filed with the Court under Seal, and is made a confidential part hereof.

3. The terms and provisions of the Stipulation of Settlement, including all exhibits and supplemental exhibits thereto, are hereby fully and finally approved as fair, reasonable and adequate as to, and in the best interests of, each of the Settling Parties and the class members whose individual claims are hereby extinguished, except as to eligibility for relief provided by the Stipulation of Settlement; and the Settling Parties and class members are hereby directed to implement and consummate the Stipulation of Settlement according to its terms and provisions.

4. The Settling Parties are hereby directed to mail Post-Settlement Notice materials in the form approved by the Court in its Order dated March 11, 1997.

5. The Settling Parties are hereby directed to mail a separate notice to those class members who excluded themselves from the class prior to December 19, 1996:(a) explaining the enhancements to the Settlement, as reflected in the February 22, 1997 amendment to the Stipulation of Settlement, and (b) giving those policyholders seventy-five days from the mailing of said

notice to elect to participate in the Settlement, as amended on February 22, 1997.

6. The terms of the Stipulation of Settlement and of this Final Order and Judgment, including all exhibits and supplemental exhibits thereto, shall forever be binding on, and shall have *res judicata* and claim preclusive effect in all pending and future lawsuits maintained by or on behalf of, the plaintiffs and all other class members, as well as their heirs, executors and administrators, successors and assigns. All claims for compensatory or punitive damages on behalf of class members are hereby extinguished, except as provided for in the Stipulation of Settlement.

7. The Release set forth in Section J of the Stipulation of Settlement is expressly incorporated herein in all respects and the effective date of the Release shall be the date of this Final Order and Judgment.

8. All class members, and all persons acting on behalf of or in concert or participation with any class member, are hereby permanently enjoined from this day forward from filing, commencing, prosecuting, intervening, or participating in any lawsuit on behalf of any class member in any jurisdiction based on or relating to the facts and circumstances underlying the claims and causes of action in this lawsuit or the Released Transactions (as that term is defined in the Stipulation of Settlement). All persons receiving notice of this Order, including all class members, are hereby permanently enjoined from this day forward from bringing a class action on behalf of class members, seeking to certify a class which includes class members, or seeking damages of any sort either expressly

or impliedly on behalf of class members, in any lawsuit, in any jurisdiction, based on or relating to the facts and circumstances underlying the claims and causes of action in this lawsuit or the Released Transactions (as that term is defined in the Stipulation of Settlement).

9. Nothing in this Final Order and Judgment shall preclude any action to enforce the terms of the Stipulation of Settlement, nor shall anything in this Final Order and Judgment preclude plaintiffs or class members from participating in the ADR Process described in the Stipulation of Settlement.

Because of the procedural context of the Opinion, and its focus on class certification and approval of the Proposed Settlement, none of the findings of fact are deemed to be final for purposes of issue preclusion in any other court of competent jurisdiction.

10. Without in any way affecting the finality of this Final Order and Judgment, this Court hereby retains exclusive jurisdiction as to all matters relating to administration, consummation, enforcement and interpretation of the Stipulation of Settlement and of this Final Order and Judgment, and for any other necessary purpose.

11. This class action, including all individual claims and class claims presented thereby, is hereby dismissed on the merits and with prejudice against the plaintiffs and all other class members, without costs to any party, except as otherwise provided herein.

12. All prior restraints that tolled time limits to file appeals and stayed the right to file an appeal are dissolved.

APPENDIX A

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APPENDIX B

The plaintiffs have submitted documents including the following:

- Memorandum of Law in Support of Final Approval of the Proposed Class Action Settlement ("Pls. Settl. Memo.");
- Memorandum of Law in Support of Plaintiffs' Motion for Class Certification for Settlement Purposes ("Pls. Certif. Memo.");
- Reply Memorandum in Support of Final Approval of the Proposed Class Action Settlement ("Pls. Settl. Reply");
- Reply Memorandum in Support of Class Certification ("Pls. Certif. Reply");
- Plaintiffs' Evidentiary Submission ("Pls. Evid. Sub.");
- Joint Petition of Plaintiffs' Counsel for an Award of Attorneys' Fees and Reimbursement of Expenses and Plaintiffs' Memorandum of Law in Support of That Joint Petition;
- The Declaration of Professor H. Russell Bernard ("Bernard Decl.");
- The Affidavit of Robert W. Biederman ("Biederman Aff.");
- The Declaration of Professor Joel Cohen ("Cohen Decl.");

- The Supplemental Affidavit of Joel Cohen ("Cohen Supp. Aff.");
- The Declaration of Andrew S. Friedman ("Friedman Decl.");
- The Affidavit of Robert L. Hoyer ("Hoyer Aff.");
- The Reply Affidavit of Robert L. Hoyer ("Hoyer Supp. Aff.");
- The Declaration of Professor Samuel Issacharoff ("Issacharoff Decl.");
- The Declaration of Professor Arthur R. Miller ("Miller Decl.");
- The Affidavit of Dean John E. Sexton ("Sexton Aff.");
- The Declaration of John B. Torkelson ("Torkelson Decl.");
- The Affirmation of Georgene M. Vairo ("Vairo Affirm.");
- The Affidavit of Melvyn I. Weiss ("Weiss Aff.");
- The Appendix of Exhibits to the Weiss Aff. ("Weiss Aff. App.");
- The Supplemental Affidavit of Melvyn I. Weiss ("Weiss Supp. Aff."); and
- The Affidavit of Barry M. Weprin ("Weprin Aff.").

Prudential submitted documents including the following:

- A Memorandum in Support of Class Action Settlement ("Pru. Mem.");

- A Reply Memorandum in Response to Objections to the Class Action Settlement ("Pru. Reply");
- An Appendix to Prudential's Memoranda In Support of the Class Action Settlment and in Response to Objections ("Pru. App.");
- The Affidavit of Reid L. Ashinoff, in Pru.App., Ex. 1 ("Ashinoff Aff.");
- The Supplemental Affidavit of Reid L. Ashinoff, *in* Pru.App., Ex. 54 ("Ashinoff Supp. Aff.");
- Affidavit of Deborah Barcafer, in Pru.App., Ex. 49 ("Barcafer Aff.");
- Affidavit of Deborah Bello-Monaco, in Pru.App., Ex. 50 ("Bello-Monaco Aff.");
- The Affidavit of Thomas Burke, *in* Pru. App., Ex. 10 ("Burke Aff.");
- The Declaration of Fred Fiandaca, *in* Pru. App., Ex. 46 ("Fiandaca Decl.");
- The Affidavit of Patricia L. Guinn, *in* Pru. App., Ex. 26 ("Guinn Aff.");
- Dale S. Hagstrom, "Analysis of Possible Profit and Loss to Prudential Arising From Benifits [sic] Made Available By the Proposed Settlement in MDL Docket No. 1061 (Milliman & Robertson, February 1997), *in* Pru. App., Ex 44 ("Hangstrom Analysis");
- The Affidavit of George J. Hebel, Jr., *in* Pru. App., Ex. 27 ("Hebel Aff.");
- The Affidavit of George J. Hebel, Jr., *in* Pru. App., Ex. 41 ("Hebel Supp. Aff.");

- The Affidavit of William J. Hegarty, *in* Pru. App., Ex. 9 ("Hegarty Aff.");
- The Supplemental Declaration of William J. Hegarty, Jr., *in* Pru. App., Ex. 53 ("Hegarty Supp. Decl.");
- The Affidavit of Barbara Lautzenheiser *in* Pru. App., Ex. 30 ("Lautzenheiser Aff.");
- The Affidavit of Daniel J. McCarthy, *in* Pru. App., Ex. 28 ("McCarthy Aff.");
- The Affidavit of Richard E. Meade, *in* Pru. App., Ex. 4 ("Meade Aff.");
- The Affidavit of Esther Milnes, *in* Pru. App., Ex. 8 ("Milnes Aff.");
- Letters from selected Prudential Policyholders who opted out of the Class, *in* Pru. App., Ex. 70.
- Millman and Robertson, "Replacement Fact Sheet" *in* Pru. App., Ex. 45 ("M&R Fact Sheet");
- Multi-State Life Insurance Task Force and Multi-State Market Conduct Examination of The Prudential Insurance Company of America, *in* Pru. App., Ex. 5 ("Task Force Report").
- Excerpts from the Deposition of James Tignanelli, *in* Pru. App., Ex. 19 ("Tignanelli Dep.");

The state participants submitted, and later withdrew, documents including the following:

- Objection of the California Insurance Commissioner to Proposed Settlement ("Cal.");
- Statement of Objections of Lester A. Garringer, Jr., and Other Similarly Situated Florida

Class Members to the Notice of Class Action, Proposed Settlement ("Fla. AG");

- Supplement to Statement of Objections of Lester A. Garringer, Jr., and Other Similarly Situated Florida Class Members to the Notice of Class Action, Proposed Settlement ("Fla. AG Supp.");
- Survey Concerning Prudential Insurance Company's Class Action Settlement Notice to Florida Policy Holders, *in* Fla. AG, Ex. C, Attach. B. ("Kerr & Downs Survey");
- Affidavit of Lester A. Garringer, Jr. ("Garringer Aff.")
- The Florida Department of Insurance Amicus Curiae Brief Regarding Proposed Class Action Settlement ("Fla. DOI");
- Florida Department of Insurance Supplement to Amicus Curiae Brief ("Fla. DOI Supp.");
- Florida Department of Insurance Appendix to Amicus Curiae Brief ("Fla. DOI App.");
- Affidavit of Stephen S. Oscher, *in* DOI App., Ex. D ("Oscher Aff.");
- Objections of the Massachusetts Attorney General and Commissioner of Insurance to the Proposed Class Action Settlement ("Mass.");
- Supplemental Objections of the Massachusetts Attorney General and Commissioner of Insurance ("Mass. Supp."); and
- Objection of the Texas Department of Insurance to Proposed Settlement and Motion for Order Enforcing Subpoena Duces Tecum ("Tex.").

The objectors submitted documents including the following:

- A Motion and Memorandum of Law Filed by Objector Brent A. Beauvias In Opposition to the Proposed Settlement ("Beauvias");
- Objector Richard Johnson's Memorandum of Points and Authorities in Support of Opposition to the Settlement Agreement ("Johnson");
- A Supplement to Objector Richard Johnson's Objections and Points and Authorities In Opposition to the Settlement Agreement ("Johnson Supp.");
- Objections to Fairness, Reasonableness and Adequacy of Proposed Settlement and Award of Attorneys' Fees and Expenses by Richard Krell and Over 20 Other Individual Policyholders ("Krell");
- Brief in Support of Objections to the Proposed Settlement by Policyholders Represented by Malakoff Doyle & Finberg, P.C. ("Krell Brief");
- Supplemental Objections to Fairness, Reasonableness and Adequacy of Proposed Settlement and Award of Attorneys' Fees and Expenses by Richard Krell et al. ("Krell Supp. Obj.");
- Affidavit of S. Catherine Colder by Krell ("Colder Aff.");
- Affidavit of James M. Pietz in Support of Krell Objectors Regarding Attempts to Obtain Discovery Through Lead Counsel and Identifying Internal Documents Relating to

Prudential's Ability to Identify Policyowners Subject to Replacement ("Pietz Aff.")

- Objections to Proposed Settlement and Notice of Intention to Appear and Appearance by Counsel and Request for Leave to Intervene of Sherry Lynn Treadway, Nancy Parnell, and Edward Ginsberg ("Treadway");
- Objectors Treadway's, Parnell's and Ginsberg's Supplementary Memorandum In Support of Objection to Proposed Settlement ("Treadway Supp.").
- Objection to Deadline for Exclusion in Class Action Settlement Notice by UAW-GM ("UAW-GM");
- Supplemental Objection of Class Members Represented by UAW-GM Legal Services Plan and Request for Discovery by Class Members of Their Files ("UAW-GM Supp.")

The Court also has considered the proposed findings of fact and conclusions of law submitted by plaintiffs, Prudential, intervenor Richard Johnson, objector Beauvias, the Krell objectors, and objectors Treadway, Parnell, and Ginsberg.

APPENDIX C

GEORGINE VS. PRUDENTIAL

GEORGINE

"Futures" claimants lacking present injuries or knowledge of exposure

Mass toxic tort

Personal injury damages

Only one common issue identified

Lack of any case-dispositive common issues or defenses

Class members not ascertainable or subject to notice

Limited Settlement fund with damage caps

Conflicts among "future" exposure only claimants, "exposure" only claimants and "medical" claimants due to differences between nature of claims and relief available

No common federal claim

Insuperable variations among states' laws. No effort or ability to categorize

Nine defendants raising separate defenses

Impossible obstacles to trial. No effort or ability to demonstrate manageability

Adquacy of representation compromised by specter of collusion. Case filed simultaneously with pre-packaged settlement.

Adequacy of representation compromised by conflicts of interest. Parallel settlements of individual actions in which class counsel represented individual plaintiffs.

Ineffective notice and opt-out right for futures

Individual claims involve radically different factual and legal issues

Individual plaintiffs harmed in different ways with different results

Large individual claims – death or serious injury

No typicality due to conflicts and complex differences among class members

Personal injury damages subjective and not quantifiable

No structural protections to protect unique individual interests

PRUDENTIAL

No "futures" claimants. All class members sustained actual, present, injuries

Commercial dispute

Economic damages

Multitude of common issues susceptible to class-wide proof

Central primary common issues and potentially case-dispositive common defenses.

Class members ascertainable from Prudential's records and subject to notice

Unlimited relief available under ADR

No conflict among class members

Common federal claim

Potentially applicable laws grouped into manageable patterns per *School Asbestos*

One defendant raising uniform defenses

Trial manageable through jury instructions, special verdicts, interrogatories, sub-classes and other case management techniques.

No hint of collusion or inadequate representation. Case hotly contested from outset, protracted negotiations long after inception of litigation against backdrop of Task Force investigation

No representation of individual plaintiffs by class counsel and no parallel settlement of individual cases.

Full notice and effective opt-out right

All class members' claims arise from alleged common course of conduct and involve similar legal and factual issues

All class members harmed in similar ways with similar results

Modest individual claims – small economic losses

Class representatives' claims typical. No conflict with other class members.

Economic damages objective and quantifiable

ADR provides structural protections, allocation standards and cost-free individual representation

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-5155, 97-5156, 97-5217 & 97-5312

IN RE: PRUDENTIAL INSURANCE COMPANY
AMERICA SALES PRACTICE
LITIGATION AGENT ACTIONS

RICHARD P. KRELL, MDL transfer, N.D. Ohio,
DNJ Civil Action No. 95-6062

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

Richard P. Krell,
as well as Objectors
Elizabeth Bajek, Amanda Bajek,
Helen Bartsch, Mark Ciconte,
Raymond Dolce, Margaret Dolce,
Louise Duggan, Peter Duggan,
Charles Duncan, Mary Howe,
Mary Krell, William Morris,
Diana Racer, Thomas Racer,
Gweneth Reidel, the Estate of
Carl J. Scalzo, Marie Scalzo,
Terry Sligar, Alice Smith,
Jerry Smith, and William Walton,
Appellants at Nos. 97-5155/5156/5312

Supreme Court, U.S.
FILED
98 819 NOV 16 199
OFFICE OF THE CLERK

No. 98-___

In The

Supreme Court of the United States

October Term, 1998

RICHARD P. KRELL, et al.,

Petitioners,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME III, PAGES 459 TO 540

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IN RE: PRUDENTIAL INSURANCE COMPANY
AMERICA SALES PRACTICE
LITIGATION AGENT ACTIONS

RICHARD JOHNSON,
Intervenor-Plaintiff in District Court

Richard E. Johnson,
Appellant at No. 97-5217

(D.C. Civ. No. 95-cv-04704

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge,*

SLOVITER, STAPLETON, GREENBERG,
SCIRICA, NYGAARD, ALITO, ROTH, LEWIS,
McKEE and RENDELL, *Circuit Judges.*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the court in banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Dated: AUG. 17, 1998

LD/cc: MPM RLA MIW
ABM JJG MHB
BSW FBL 2
LS AZL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-5155, 97-5156, 97-5217 & 97-5312

In Re: Prudential

Present: SCIRICA, ROTH and RENDELL, *Circuit Judges.*

It is ORDERED that the motion for stay of mandate is DENIED because on substantive right of the applicant will be affected by failure to grant the stay of mandate. This is without prejudice to the applicant's right to file a timely petition for writ of certiorari.

/s/ Anthony J. Scirica
Circuit Judge

Dated: Oct. 28, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-5155, 97-5156, 97-5217 & 97-5312

IN RE: PRUDENTIAL INSURANCE COMPANY
AMERICA SALES PRACTICE LITIGATION
AGENT ACTIONS

RICHARD P. KRELL, MDL transfer, N.D. Ohio,
DNJ Civil Action No. 95-6062

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

Richard P. Krell, as well as Objectors Elizabeth Bajek, Amanda Bajak, Helen Bartsch, Mark Ciconte, Raymond Dolce, Margaret Dolice, Louise Duggan, Peter Duggan, Charles Duncan, Mary Howe, Mary Krell, William Morris, Diana Racer, Thomas Racer, Gweneth Reidel, The Estate of Carl J. Scalzo, Marie Scalzo, Terry Sligar, Alice Smith, Jerry Smith, and William Walton,
Appellants at Nos. 97-5155/5156/5312

IN RE: PRUDENTIAL INSURANCE COMPANY
AMERICA SALES PRACTICE LITIGATION
AGENT ACTIONS

RICHARD JOHNSON,
Intervenor-Plaintiff in District Court

Richard E. Johnson,
Appellant at No. 97-5217

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 95-cv-04704)

Present: Scirica, Roth and Rendell, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel on January 26, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 17, 1997, certifying the proposed class and approving the settlement, be, and the same is hereby affirmed. The judgment regarding attorneys' fees is vacated and the matter is remanded on the issue of attorneys' fees. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ P. Douglas Sisk
Clerk

Dated: July 23, 1998

CONSTITUTION OF THE UNITED STATES

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisite of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy

already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment

in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an

order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissed or Compromise. A class shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

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§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

IMPORTANT NOTICE TO:

ALL PERSONS WHO PURCHASED CERTAIN LIFE INSURANCE POLICIES FROM PRUDENTIAL FROM JANUARY 1, 1982 THROUGH DECEMBER 31, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION	:	MASTER DOCKET NO. 95-4704 (AMW)
THIS DOCUMENT RELATES TO ALL ACTIONS LISTED ON EXHIBIT A	:	MDL NO. 1061

NOTICE OF CLASS ACTION, PROPOSED SETTLEMENT, SETTLEMENT HEARING AND RIGHT TO APPEAR

THIS IS AN OFFICIAL NOTICE FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY TO INFORM ALL PERSONS WHO PURCHASED CERTAIN LIFE INSURANCE POLICIES FROM PRUDENTIAL FROM JANUARY 1, 1982 THROUGH DECEMBER 31, 1995 OF A PROPOSED SETTLEMENT IN THIS CLASS ACTION LAWSUIT.

YOU SHOULD READ THIS NOTICE CAREFULLY BECAUSE IF YOU ARE A MEMBER OF THE CLASS. IT WILL AFFECT YOUR LEGAL RIGHTS AND WILL BE LEGALLY BINDING UPON YOU IN THE FUTURE, HOWEVER, YOU DO NOT HAVE TO DO ANYTHING AT THIS TIME TO OBTAIN RELIEF UNDER THE PROPOSED SETTLEMENT.

1. PURPOSE OF THE NOTICE

You have been sent this Notice because you may be eligible for certain relief to be provided as part of the proposed settlement of a consolidated class action lawsuit. The lawsuit was brought on behalf of a class of policyholders against The Prudential Insurance Company of America ("Prudential"). The lawsuit alleges a variety of claims relating to the manner in which Prudential sold life insurance policies. The class generally includes all persons who purchased individual permanent (whole life) insurance policies issued by Prudential during the period from January 1, 1982 through December 31, 1995 (the "Class Period").

A proposed settlement has been reached between Prudential and the Plaintiffs in the lawsuit. The Court has conditionally certified the Class for settlement purposes and determined that the settlement was sufficient to justify sending you this Notice. The Court will hold a hearing regarding the fairness, reasonableness and adequacy of the proposed settlement before deciding whether final approval will be granted. Unless you exclude yourself from the class, you will be bound by the terms of the settlement, if final approval is granted. That means you could not pursue your own lawsuit against Prudential for claims covered by this class action.

This Notice contains the following important information:

- a description of those persons who are included in the Class;
- A description of the lawsuit;

- A description of state insurance department and Multi-State Life Insurance Task Force examination of Prudential and the policyholder remediation plan that 43 states and the District of Columbia accepted. The interaction of the Multi-State Task Force remediation plan with the proposed class action settlement is also described;
- A detailed discussion of the relief being made available to Class Members;
- A description of the release of claims which Class Members will give Prudential; and
- An explanation of how you can request to be excluded from the Class, or object to the settlement.

2. SUMMARY OF THE PROPOSED SETTLEMENT RELIEF

If you are a Class Member, the settlement offers you two alternative forms of relief in exchange for resolving all of your claims involving the sale, servicing or operation of your whole life policies (as set forth in the Release and Waiver Section below). (A detailed description of the relief offered under the settlement is contained in Section 6.)

First, you may elect to participate in an Alternative Dispute Resolution Process (the "ADR Process"). The ADR Process is offered at no cost to Class Members and provides a simplified means for Class Members who believe that they may have been misled regarding the sale of their policies to have their claims resolved without having to go to court. The ADR Process provides Class

Members an opportunity to obtain relief without the delays and expense of traditional litigation and without being subject to certain legal defenses, such as statutes of limitation, which Prudential could raise to possibly defeat claims in a court proceeding. The relief awarded in the ADR Process will depend on the type of claim and the available evidence. You may also be eligible to receive a portion of the Additional Remediation Amount (as described below). There is no guarantee, however, that you will receive any relief in the ADR Process, and by electing to file an ADR claim you will not be able to seek Basic Claim Relief. For further explanation see "Description of the Proposed Settlement – Alternative Dispute Resolution Process" below.

Second, as an alternative to the ADR Process, Class Members may obtain Basic Claim Relief, Basic Claim Relief requires no showing by the Class Member of any wrongdoing by Prudential. Depending on the circumstances, the relief can include loans at favorable interest rates to pay premiums and/or the opportunity for you to purchase life insurance policies or annuities with values enhanced at Prudential's expense, or to purchase shares of mutual funds with Prudential contributing additional shares of such funds. Each of these options is described in detail below.

3. THE CLASS AND CHOICES YOU NEED TO MAKE NOW

Judge Alfred M. Wolin of the United States District Court for the District of New Jersey has issued an Order conditionally certifying only for settlement purposes a

class of all persons who own or owned at termination an individual permanent (whole life) insurance policy issued by Prudential or any of its United States life insurance subsidiaries during the Class Period of January 1, 1982 through December 31, 1995 (the "Policy" or "Policies"), except as specifically described below ("Policyholders"), and who do not timely exclude themselves from participating in the settlement ("Class Members" or the "Class").

The Policyholders do not include the following persons or entities (unless such persons or entities are Policyholders by virtue of their ownership interest in other Policies): (i) policyowners who were represented by counsel at the time they executed a document in connection with a settlement of a claim, action, lawsuit or proceeding, pending or threatened, that released Prudential with respect to such Policies, (ii) policyowners that are corporations, banks, trusts or non-natural entities, which purchased Policies as corporate- or trust-owned life insurance and under which *either* (a) there are 50 or more separate insured individuals *or* (b) the aggregate premium paid over an eight (8) year period, ending with the close of 1996, exceeds one million dollars, or (iii) policyowners who were issued Policies in 1995 by Prudential Select Life Insurance Company of America.

As you will see from reading this Notice, if you are an eligible Policyholder, you have the following choices *with respect to each Policy issued during the Class Period* in which you have an ownership interest:

- You may remain in the Class and participate in the relief of the proposed settlement. If this is what you choose to do, you need not

take any action at this time. Your interests will be represented without cost to you by Lead Counsel, as defined herein, for the Class, and if you live within one of the states or the District of Columbia which has accepted the Task Force remediation plan, by a Regulatory Oversight Staff composed of state insurance regulators. If the settlement is approved by the Court, you will be contacted again and will be asked which of the available relief, if any, you wish to elect. You should keep in mind that, if you remain in the Class, you will be bound by all orders and judgments entered in this case, including the release and waiver of claims which absolves Prudential of further liability to you in connection with the sale of your Policy. (See Section 8 below).

- If you remain in the Class, you may file with the Court a written objection to any aspect of the proposed settlement. Objections must be received by the Court and counsel for the Plaintiffs and Prudential, no later than December 19, 1996. To do so, you must comply with the requirements described below in Section 10. In addition, you for an attorney acting on your behalf at your expense) may appear before the Court to voice your objection to the extent allowed by the Court. If the Court does not agree with your objection, you nevertheless will be bound by the orders and judgments in this case.

- If you do not wish to remain in the Class, you may exclude yourself by sending a formal, written request for exclusion that complies with the requirements described below

in Section 9. Such request must be sent to the address provided in Section 9 below and postmarked no later than December 19, 1996. If the proposed settlement is approved and you request exclusion, (i) you lose all rights to relief under the Class Action Settlement Program, as defined below, (ii) you may not file any objection to the proposed settlement, and (iii) you will not be bound by any orders or judgments in this case.

Please keep these three choices in mind as you read this Notice. Your decision will be affected by all the information in this Notice, including in particular the information about the release of Class Members' claims in Section 8, and about the interaction with the Multi-State Task Force remediation plan in Section 11. **YOU MAY MAKE A DIFFERENT CHOICE FOR EACH POLICY YOU OWN.**

4. DESCRIPTION OF THE LAWSUITS

The class action proposed to be settled is consolidated from a number of lawsuits, which were filed beginning in February, 1995, and which were centralized by the Judicial Panel on Multi-district Litigation (the "Judicial Panel") in the United States District Court for the District of New Jersey as part of *In re The Prudential Insurance Company of America Sales Practices Litigation*. MDL Docket No. 1061 (the "Centralized Proceeding"). By order dated August 3, 1995, and in several subsequent transfer orders, the Judicial Panel consolidated these lawsuits for pretrial purposes. The Honorable Alfred M. Wolin is presiding over the Centralized Proceeding. The Court has approved

the law firms of Milberg Weiss Bershad Hynes & Lerach LLP and Much Shelist Freed Denenberg Ament Bell & Rubenstein, P.C. as Lead Counsel to represent the Class, in settlement of this action.

On October 24, 1995, plaintiffs in several of the lawsuits joined together to file a Consolidated Amended Class Action Complaint in the Centralized Proceeding. Prudential subsequently moved to dismiss all of the claims in this complaint. By Order dated May 10, 1996 (as amended June 10, 1996), the Court dismissed only portions of that complaint, and plaintiffs were allowed to proceed with certain of their claims. Defendants' motion to stay the Centralized Proceeding was denied. Lead Counsel conducted formal and informal discovery as further described in "Description of Proposed Settlement – Background to the Settlement." Section 6. On September 20, 1996, plaintiffs in eleven of the lawsuits in the Centralized Proceeding joined in the filing of a Consolidated Second Amended Class Action Complaint (the "Consolidated Complaint") naming Prudential and several of its former officers and directors as defendants.

The Consolidated Complaint purports to be brought on behalf of a nationwide class of persons who purchased individual permanent life insurance policies from Prudential in the United States between the period January 1, 1982 and the present. The plaintiffs in the Consolidated Complaint make allegations, among other things, that Prudential engaged in a common course of conduct through which life insurance was improperly sold through misrepresentations concerning:

(i) the use of an existing policy's cash value or dividend or interest stream to purchase or maintain a new policy or other policy by means of a surrender, withdrawal or loan (sometimes referred to as "twisting" or "churning");

(ii) the number of out-of-pocket cash premium payments required to be paid for a policy and/or the benefits to be realized or paid based on a particular number of cash premium payments (sometimes referred to as "vanishing premiums"); and

(iii) an assertion that the product being sold was solely or predominantly an investment or savings vehicle rather than a life insurance policy.

Prudential has not admitted liability for any of the allegations made in the Consolidated Complaint. Prudential contends that the use of policy cash values or accumulated dividends to finance the purchase of insurance can at times be beneficial to Policyholders and it was the Company's policy at all times to conduct such sales only when appropriate, and when disclosed to the Policyholder. Prudential also takes the position that the Abbreviated Payment Plan, under which dividends are used to pay premiums on a whole life policy, can be beneficial to Policyholders by reducing the number of out-of-pocket cash premiums that have to be paid for life insurance coverage. Prudential also maintains that it never encouraged sales that failed to disclose that the product being offered was life insurance, and that Prudential policies and policy applications all fully disclosed that customers were purchasing life insurance. Prudential

also believes that it has a number of legal defenses, including statute of limitations defenses, which it could assert in litigation to possibly defeat claims by Policyholders. Prudential is concerned, however, that some Policyholders may have been misled in the purchase of their policies and wants to provide Policyholders who were misled with an opportunity to obtain relief.

5. THE MULTI-STATE LIFE INSURANCE TASK FORCE

The proposed settlement reached in this lawsuit expands upon and adds to a remediation plan that Prudential and 43 states and the District of Columbia agreed to in July, 1996 to resolve legitimate Policyholder claims. The background of that remediation plan is as follows.

On April 25, 1995, partially in response to allegations made in several lawsuits, the New Jersey Commissioner of Insurance formed a Multi-State Life Insurance Task Force (the "Task Force") to examine the sales and marketing practices in the life insurance industry. The Task Force began with a market conduct examination of Prudential, the largest life insurer in the United States. Thirty states joined the Task Force. In conducting its examination, the Task Force reviewed and analyzed documents and electronic databases consisting of millions of Prudential records. They also interviewed hundreds of Prudential agents and executives.

On July 9, 1996, the Task Force issued a report setting forth the findings of its market conduct examination. The Task Force found that some Prudential policyholders had

been misled in their life insurance purchases and that Prudential's efforts to prevent such abuses had been inadequate. In connection with the issuance of the Task Force report, the Task Force and Prudential each announced a remediation plan which the Task Force and Prudential agreed provided fair and appropriate relief to Policyholders who may have been harmed by misrepresentations made in the sale of their policies (the "Task Force Plan"). Forty-three states and the District of Columbia executed agreements adopting the Task Force report and directing Prudential to implement the Task Force Plan. The Policyholders in those States who are to be eligible to participate in the Task Force Plan are the same Policyholders who may also be Class Members in the proposed Class Action Settlement.

Prior to implementing the Task Force Plan, Prudential reached a proposed settlement with the Class that includes a remediation plan that expands upon the Task Force Plan and, if approved by the Court and affirmed on appeal, would provide additional significant relief to Policyholders. In order to provide the increased relief to the residents of their jurisdictions and to avoid the possible confusion from multiple mailings of different proposals, it is anticipated that the states that accepted the Task Force Plan will agree to allow Prudential to defer until February 1, 1997, after the scheduled hearing for approval of this class action settlement, the mailing that will mark the implementation of the policyholder remediation program. The interrelation of the Task Force Plan and this Class Action Settlement is described in detail in Section 11.

6. DESCRIPTION OF THE PROPOSED SETTLEMENT

A. Background to the Settlement

The proposed settlement resulted from more than one year of litigation, formal and informal discovery, and an intensive investigation of the relevant facts and law by Lead Counsel and other lawyers for the plaintiffs in the lawsuits combined in the Consolidated Complaint (the "Plaintiffs' Lawyers"). The investigation conducted by Plaintiffs' Lawyers included interviews with present and former policyholders, agents, and Prudential employees, as well as sworn depositions of numerous Prudential executives, senior management and other personnel. Plaintiffs' Lawyers were provided with all documentation, including millions of pieces of electronic data, and other information produced to the Task Force in connection with its examination and used in the development of its report. In addition, Plaintiffs' Lawyers reviewed approximately 800,000 pages of documents, 160 computer diskettes and cartridges, and 45 videotapes and audiotapes concerning a wide variety of matters and business functions at Prudential, Plaintiffs' Lawyers and lawyers for Prudential then entered into extensive arms-length negotiations that resulted in the proposed settlement.

B. Detailed Description of the Settlement Relief

The proposed settlement would implement a policyholder remediation program which provides remedies and procedural safeguards in addition to those in the Task Force Plan (the "Class Action Settlement Program"). See "Interaction Between the Task Force Plan and the

Class Action Settlement Program." Section 11 below. Prudential has pledged to resolve all claims of Policyholders who were misled in the purchase of their policies. Once the proposed settlement is approved by District Court Judge Wolin, Prudential and Lead Counsel for the Class have agreed that many components of the additional relief provided by the Class Action Settlement Program would be provided to Class Members. The additional relief is supplemental to that provided under the Task Force Plan. The Task Force Plan is not subject to the Court's approval. However, the Financial Guarantee, Additional Remediation Amount and Minimum Payment (each as described in Section 6.B.1.f. below) and the Basic Claim Relief Enhancements (as described in Section 11 below) in the Class Action Settlement Program will be made available only if the settlement is upheld by all appellate courts. If you have any questions as to the relief for which you may be eligible, please call 1-800-736-8913 (24 hours a day on weekdays (beginning Monday at 8 a.m.) and Saturdays from 9 a.m. to 3 p.m., your local time).

The forms of relief which will be made available to Class Members under the proposed Class Action Settlement Program are as follows:

1. Alternative Dispute Resolution Process

Any Class Member who believes that he or she was misled regarding the sale of his or her Policy may submit a claim to an alternative dispute resolution process (the "ADR Process"). The ADR Process is a streamlined and no-cost means for Class Members to have their claims

resolved without having to go to court. In addition, in claims pursued through the ADR Process, Prudential will waive its right to raise certain legal defenses, such as statute of limitations defenses, which could be available to Prudential to possibly defeat such claims in contested litigation. The ADR Process also provides the opportunity for a Class Member to obtain individual relief tailored to his or her claim. However, there is no guarantee that this process will result in a determination in the Class Member's favor, and by choosing this process, the Class Member could lose the right to take advantage of an Optional Premium Loan, an Enhanced Value Policy, and Enhanced Value Annuity and/or a Mutual Fund Enhancement (when available) that otherwise may have been available if the Class Member had selected Basic Claim Relief.

To file a claim under the ADR Process, a Class Member initially must submit a claim form, which Prudential will provide by mail, in which the Class Member describes the misrepresentation made or other improper sales practice. The insurance regulators, the Plaintiffs' Lawyers and Prudential have agreed on the forms and procedures to be used, the nature of the evidence necessary and the type of relief that may be awarded.

a. Submission of ADR Claim

Following a Class Member's election to participate in the ADR Process, a claim form will be forwarded. The claim form is designed to obtain information necessary for the evaluation of the claim, such as what the agent told and showed the Policyholder in connection with the sale, and what the Policyholder told the agent about his

or her financial and other needs or objectives. With the Claim Form, the Class Member is requested to submit all documents and materials in the Class Member's possession concerning the claim. It is important that Class Members submit all information that they want to have considered.

b. Assembly of Claim File

Prudential's Claim Evaluation Staff is required to gather all information and documentation from Prudential's files and provided by Class Members concerning a Policy and its sale. The Claim Evaluation Staff will be monitored by Lead Counsel, insurance regulators from various states accepting the remediation program (the "Regulatory Oversight Staff") and independent auditors. This information will include, among other things, sales practices complaints against the agent and disciplinary actions with respect to life insurance sales practices against the agent who sold the Policy. Prudential will also attempt to contact the agent who sold the Policy about the Class Member's claim.

c. Evaluation of Claims

The ADR Process sets forth a detailed procedure, including objective criteria, to evaluate the claim presented by the Policyholder in the claim form, and the information gathered by Prudential to determine whether a Policyholder was misled in the purchase of his or her Policy. In addition to considering what the Policyholder was told by the agent and the documents received by the

Policyholder, such as a policy illustration, other evidence, including sales practices complaints against the agent who sold the policy and, with respect to Financed Insurance claims, the extent to which the agent engaged in financed transactions, will be considered.

d. ADR Claim Review Process

First, Prudential's Claim Evaluation Staff will evaluate and score the claims. This Claim Evaluation Staff will not be comprised of persons who were involved in the sale of insurance.

Second, if the Class Evaluation Staff does not award the *highest* score to a given claim, it will automatically be reviewed by the Independent Claim Evaluation Team ("ICET"). This team will be comprised of persons with *no* affiliation with Prudential. The ICET will not be bound by any determination made by the Claim Evaluation Staff and will follow the guidelines established under the settlement.

Third, if the ICET concludes that the claim should receive a higher score than awarded by the Claim Evaluation Staff, then the Prudential Claim Review Staff will re-evaluate the claim taking into consideration the recommendation of the ICET. The Claimant will receive a decision from the Claim Review Staff indicating the award. This Claim Review Staff will not be comprised of persons who were involved in the sale of insurance and will be monitored by Lead Counsel, the Regulatory Oversight Staff, and independent auditors.

Fourth, if the Claimant is dissatisfied with the award issued by the Claim Review Staff, then the claim, at no cost to the Claimant, will be reviewed by an impartial decision-maker. This reviewer will be a person with no affiliation with Prudential, with expertise in life insurance or insurance claim resolutions, and will be selected by Lead Counsel and the Regulatory Oversight Staff. Such impartial decision-makers are not bound by the relief awarded by the Claim Review Staff; rather, they are instructed to independently review the claim. The Policyholder is afforded the right to use a Representative, who is selected by Lead Counsel and approved by the Regulatory Oversight Staff, to assist the Policyholder during the review by the impartial decision-maker. The decision of the impartial decision-maker will be binding upon the Policyholder and Prudential unless the Claimant Representative, appointed by Lead Counsel to act as an advocate on behalf of all Class Members submitting claims to the ADR Process, determines, at the request of the Policyholder, that the decision operates as a "manifest injustice." in that event, there will be a rehearing.

e. Types of Relief Available in the ADR Process

The type of relief available to Class Members through the ADR Process depends on the nature of the claim and the strength of the evidence. Relief may be available, under certain circumstances, even if the insured has died and death benefits have previously been paid on a Policy for which you are a successor in interest (i.e., executor, heir, etc.). Examples of available relief are as follows:

- Financed Insurance – If evidence shows that you were misled in connection with a Financed Insurance sale (one that generally involves the use of loans, dividends or values of existing Policies to pay premiums on a new policy), your remedies may range from the return of policy values improperly used, to allowing you to cancel your Policy and receive a refund of some or all of the premiums you paid, including interest in some cases. Misrepresentations in connection with financed insurance sales are sometimes referred to as "twisting" or "churning."

- Abbreviated Payment – If evidence shows that you were misled in connection with a sale involving Abbreviated Payment (one that generally involves the use of a policy's dividends or policy values to reduce the number of out-of-pocket premium payments on the same policy), you may not need to make out-of-pocket payments for some or all of the premiums otherwise due. Or, you may be allowed to cancel your Policy and receive a refund of some or all of the premiums you paid, including interest in some cases. You may be entitled to receive this relief even if you have not yet reached the last out-of-pocket premium payment you expected to make, and even if you have not been told that your Policy will require the out-of-pocket payment of premiums for longer than originally expected. These sales are sometimes referred to as "vanishing premium" sales.

- Investment Product – If evidence shows that you were misled about whether you were

purchasing life insurance rather than an investment, savings or retirement product, you may be allowed to cancel your unwanted Policy and receive a refund of some or all of the premiums you paid, including interest in some cases. Or, you may be able to exchange your Policy for an annuity to be purchased with the amount otherwise available for refund.

- Other Claims – If evidence shows other improper life insurance sales practices, you may be remedied through the cancellation of your Policy with a refund of some or all of the premiums you paid, including interest in some cases, or the issuance of a substitute product purchased with the amount otherwise available for refund.

f. Financial Guarantee, Minimum Payment and Additional Remediation Amount

Prudential has also agreed to make certain additional payments to eligible Class Members and to guarantee that its pre-tax cost for remedies will reach minimum levels, but only if the proposed settlement is both approved by Judge Wolin *and* upheld on any appeal, as follows:

- Financial Guarantee – In addition to relief specified above, Prudential also has agreed to guarantee that the pre-tax cost for remedies in the ADR Process for each 110,000 claims receiving remedies will be approximately $260 million (the "Financial Guarantee"). If the actual expense is less than this

amount. Prudential guarantees it will add the remaining amount of money (for up to a maximum number of 330,000 claims remedied) to the Additional Remediation Amount to be distributed to Class Members who receive remedies in the ADR Process, as described below.

- Minimum Payment – Regardless of the number of claims that receive remedies. Prudential also has agreed to pay at least $410 million (the "Minimum Payment"), which is the same amount it would pay if 110,000 claims were remedied ($260 million of Financial Guarantee and $150 million of Additional Remediation Amount).

- Additional Remediation Amount – In addition, Prudential will pay an additional remediation amount based on a sliding scale which will depend on the number of claims remedied in the ADR Process (the "Additional Remediation Amount"), as follows:

    - If 110,000 claims are remedied, the Additional Remediation Amount will be $150 million.

    - If 220,000 claims are remedied, the Additional Remediation Amount will be $250 million.

    - If 330,000 claims are remedied, the Additional Remediation Amount will be $300 million.

    - If 440,000 claims are remedied, the Additional Remediation Amount will be $250 million.

- If 550,000 claims are remedied, the Additional Remediation Amount will be $150 million.
- If 660,000 claims or more are remedied, the Additional Remediation Amount will be $50 million.

The exact amount of the Additional Remediation Amount will be determined at the end of the ADR Process and is dependent on the total number of claims that are remedied. If the settlement is upheld on appeal, the Court will determine how the Additional Remediation Amount will be allocated and distributed after the completion of the ADR Process.

2. Basic Claim Relief

All Class Members will be eligible for Basic Claim Relief. To obtain Basic Claim Relief, a Class Member does not have to show that he or she was misled in any way or that any improper sales practices occurred. However, the option of selecting Basic Claim Relief would not be available to Class Members who choose to participate in the ADR Process, and whose claims receive no award of relief.

There are three forms of Basic Claim Relief which will be available to Class Members. You will be informed as to which options you are eligible to select when the remediation program is implemented. The types of Basic Claim Relief which Prudential will offer are as follows:

(a) *Optional Premium Loans.* Class Members who have Policies in force that were issued during the Class Period have the right to

obtain "Optional Premium Loans." which are loans made to you at a reduced interest rate, subject to certain conditions. These loans will be available to eligible Class Members solely to pay all or part of a specified number of annual premiums on the Class Member's Policy. (the specified number of annual premiums, anywhere from two to six, will depend on when the Policy was issued.) Optional Premium Loans will remain available to an eligible Class Member on his or her annual policy anniversary through December 31, 2010. The purpose of an Optional Premium Loan is to assist an eligible Class Member in making additional out-of-pocket premium payments.

Each Optional Premium Loan will be repaid by the policyholder over a period of five years commencing on the policy anniversary following the date on which the Optional Premium Loan is made. Each payment will consist of accrued interest due plus one-fifth of the original amount of the Optional Premium Loan outstanding.

Optional Premium Loans are not "policy loans" as described in your Policy. They must nevertheless be secured by an assignment of the Policy's cash value and the death benefit as collateral to cover the amount of the Optional Premium Loans (including the Optional Premium Loan being requested), existing policy loans and other instruments outstanding, plus one-year's interest on all such obligations (collectively, the "Outstanding Obligations").

The interest rate (reset quarterly) on the Optional Premium Loans offered to Class Members shall be representative of Prudential's unsecured short-term cost of borrowing. This rate may vary up or down depending on when the loan is taken and may also vary during the time the loan is outstanding.

In order for a Class Member to be eligible for the Optional Premium Loan, the Class Member's Policy must be in force and, following the Optional Premium Loan transaction, have a cash value sufficient to secure the full amount of all Outstanding Obligations.

(b) *Enhanced Value Policies.* Class Members with Policies in force that are heavily loaned, or who owned Policies that have lapsed or terminated without death benefits being paid, will have the right to apply to purchase Enhanced Value Policies, subject to certain conditions summarized below.

An Enhanced Value Policy will be a designated whole life insurance policy within Prudential's portfolio of individual permanent life insurance policies available on the date of the award. The insured and the Policyholder(s) will be the same as on the Policy with respect to which the election is made. After the Class Member has paid the first year's annual premium. Prudential will "enhance" the policy by buying additional insurance coverage for the Class

Member over the next five years, with Prudential paying an amount equal to 100 percent of the Class Member's first-year premium over that five-year period. In addition, in the event the proposed settlement is approved by the Court and upheld on appeal, Prudential will further enhance the policy by buying additional insurance coverage for the Class Member in the seventh year. Prudential will pay an additional amount in the seventh year equal to 15% of the Class Member's first year premium. These enhancements will increase the death benefit protection of the policy at no additional cost to the Class Member.

The insured will have to provide satisfactory evidence of insurability and be age 85 or less. However, the underwriting will be less rigorous than typically applies to the purchase of a new policy. The Class Member must make the initial payment for the Enhanced Value Policy with money from a source other than a surrender of, or a policy loan against, or withdrawal of the values of, any existing life insurance or annuity product issued by Prudential.

(c) *Enhanced Value Annuities.* Every Class Member will be eligible to apply to purchase an "Enhanced Value Annuity."

An Enhanced Value Annuity is a non-qualified deferred annuity which Prudential, as part of this settlement, will "enhance" by crediting payments credited to the annuity at the end of the first and second contract years. Specifically, at the end of the first year after the Class Member has made his/

her initial payment. Prudential will pay into the annuity an additional 2 percent of the Class Member's initial payment if the initial payment was under $25,000, or an additional 3 percent of the Class Member's initial payment if the initial payment was between $25,000 and $50,000. In either case, at the end of the second year. Prudential will also pay into the annuity an additional 2 percent of the initial payment. In addition, in the event that the proposed settlement is approved by the Court and upheld on appeal. Prudential will further enhance the annuity by paying into the annuity an additional 1 percent of the initial premium at the end of the third year. This enhancement will increase the value of this annuity at no additional cost to the Class Member.

Prudential will also waive the surrender charges with respect to the initial payment and the enhancements made by Prudential beginning on the later of (a) the date that the Class Member reaches the age of 59 1/2 or (b) the date on which the Enhanced Value Annuity has been in force for four years. The Enhanced Value Annuity is subject to a $1,000 minimum payment and a maximum payment based on the face amount of the Class Member's original Policy as provided below:

Class Member's Policy Face Amount	Maximum Amount of Initial Payment Subject to Enhancement
Less Than $100,000	$10,000
From $100,000 to $249,999	$20,000
From $250,000 to $999,999	$30,000
$1,000,000 or over	$50,000

You may not pay an aggregate amount for any Enhanced Value Annuity and/or Mutual Fund Enhancement in excess of the applicable Maximum Amount of Initial Payment Subject to Enhancement set forth above. A Class Member must purchase an Enhanced Value Annuity with money that is not taken from the proceeds of the surrender of or withdrawal from, or a policy loan against, the values of any existing life insurance or annuity product issued by Prudential. No tax-qualified money will be accepted as payment for an Enhanced Value Annuity. The Enhanced Value Annuity will not be issued on a tax-qualified basis.

You must be age 85 or less to apply for an Enhanced Value Annuity. The owner and annuitant for the Enhanced Value Annuity will be the owner of the Policy with respect to which the election is made, provided that if the owner of the Policy with respect to which the election is made is a corporation, trust, or other entity, then the owner and annuitant may be the insured on the Policy with respect to which the election is made.

(d) *Mutual Fund Enhancement.* Every Class Member will be eligible to purchase shares

in certain designated mutual funds with Prudential contributing additional fund shares.

Although you will be able to select this form of Basic Claim Relief when you submit your Election form, this Mutual Fund Enhancement will only be available in the event the Class action settlement is approved by the Court and upheld on appeal. If the Class action settlement is rejected by the Court or not upheld on appeal, you will be notified that the Mutual Fund Enhancement will not be made available to you. In that case, if the Mutual Fund Enhancement was your only Basic Claim Relief selection, you may make another selection.

For each Class Member's purchase of shares in certain designated mutual funds currently distributed by Prudential Securities, Inc., Prudential will "enhance" the amount of the initial purchase with a financial contribution to purchase additional shares equal to 4% of the amount of such initial purchase. The mutual fund shares will be offered subject to a contingent deferred sales charge, as described in the relevant prospectus, that generally decreases to zero over a period of approximately six years. Your initial purchase of mutual fund shares must be no less than $1,000, or such other amount as set forth in the applicable prospectus, and the amount entitled to receive the enhancement described above is subject to the following limits:

Class Member's Policy Face Amount	Maximum Policyholder Initial Purchase Amount Subject to Enhancement
Less Than $100,000	$10,000
From $100,000 to $249,999	$20,000
From $250,000 to $999,999	$30,000
$1,000,000 or over	$50,000

You may not pay an aggregate amount for any Mutual Fund Enhancement and/or Enhanced Value Annuity in excess of the applicable Maximum Policyholder Initial Purchase Amount Subject to Enhancement set forth above.

In addition to selecting either an Enhanced Value Policy, an Enhanced Value Annuity or a Mutual Fund Enhancement, a Class Member, if eligible, may also choose to obtain an Optional Premium Loan.

7. INCOME TAX CONSEQUENCES

Your receipt of the relief described above in either the ADR Process or in Basic Claim Relief could have tax consequences for you. Those tax consequences may vary, depending upon your individual circumstances. **You should consult your own tax advisor to determine any Federal, state, local or foreign tax consequences of the receipt of relief in your particular circumstances.**

The following applies only to the selection of an Optional Premium Loan if you elect Basic Claim Relief. While unlikely, there is some risk that the Optional Premium Loan could be considered a below market rate loan

for Federal income tax purposes. In such event, the difference between the Optional Premium Loan interest rate and a specified Federal short-term interest rate generally based on the average market yield of United States Treasury obligations with maturities of three years or less, if any, would reduce your cost basis for tax purposes in your Policy, or result in taxable income in the event there is no remaining cost basis in your Policy. Your cost basis in your Policy is important because it determines what portion of distributions under the Policy may be taxable. Moreover, as with any policy loan or pledge of your Policy, an Optional Premium Loan may be wholly or partially taxable to you if your Policy is a "Modified Endowment Contract" (as defined by the Internal Revenue Code) at the time you receive an Optional Premium Loan or, in some circumstances, if your Policy becomes a "Modified Endowment Contract" following your receipt of an Optional Premium Loan. You may also be subject to a 10% penalty tax on the taxable amount. You are particularly urged to consult your tax advisor if your Policy is a "Modified Endowment Contract" at the time you request any Optional Premium Loan, or if you consider making any material changes to your Policy after you receive an Optional Premium Loan.

8. RELEASE OF CLASS MEMBERS' CLAIMS

a. Class Release and Waiver

If the proposed settlement is approved by the Court, and affirmed on appeal, the lawsuit will be dismissed with prejudice, and Prudential will be released from all claims that have been or could have been

asserted by Class Members. The release encompasses any matter relating to the marketing, solicitation, application, underwriting, acceptance, sale, purchase, operation, retention, administration, servicing, or replacement, by means of surrender, partial surrender, loans respecting withdrawal and/or terminations of Policies or any insurance policy or annuity sold in connection with or relating in any way directly or indirectly to the sale or solicitation of, the Policies. The release is intended to be very broad. The release is a critical element of the proposed settlement, and accordingly, the entire text has been included in Appendix A to this Notice (except for certain defined terms that appear elsewhere in this Notice). Because it will affect your rights if you remain in the Class, you should carefully read this paragraph and the entire release.

b. Release Upon Election of ADR Process or Basic Claim Relief

In addition, if you elect to participate in the ADR Process or to receive Basic Claim Relief, you will be required to sign a form of this release which will prevent you from bringing any lawsuit or participating in any other class action relating to the sale, servicing or operation of your Policy which may be brought against Prudential if the proposed settlement is not approved on appeal or otherwise.

However, if you elect to participate in the ADR Process, within 60 days of your receipt from Prudential of notice that the settlement has either not been approved by the Court or has been rejected on appeal,

you will be allowed to rescind your release and the relief you received under the remediation program and thereby return, to the extent practicable, to the position you were in before entering the program. If the settlement is approved by the Court, and affirmed on appeal, Prudential will be released from all claims, regardless of whether you elect to seek relief in the ADR Process.

9. EXCLUSION FROM THE CLASS

If you wish to exclude yourself from the Class with respect to one or more Policies, you must comply with the requirements described in this Section. You must send a formal, written request for exclusion as to each such Policy to the following address:

Prudential Class Action Settlement
P.O. Box 9354
Boston, Massachusetts 02205-9354

Your written request for exclusion must be *postmarked by no later than* December 19, 1996, otherwise it will be untimely and your request for exclusion will be waived and you will be bound by the settlement and all orders and judgments in the actions.

Your letter must (i) identify by policy number the Policy or Policies for which you are requesting exclusion (you can find your policy number on the materials enclosed with this Notice), (ii) state that you want to be excluded from the Class with respect to each such Policy or Policies, and (iii) include your name, your address, your telephone number, and name and caption of this lawsuit, and your signature. If you have an ownership interest in more than one Policy, you may choose to

remain a Class Member with respect to some Policies, but to exclude yourself from the Class with respect to other Policies.

If two or more individuals or entities share (or shared at the time of termination) ownership in one Policy, all such individuals or entities must exclude themselves in order for any to be excluded with respect to the Policy. Please be sure to write "exclusion notice" on the lower left-hand corner of the front of the envelope.

If you exclude yourself from the Class, you will not be permitted to object to or participate in the proposed settlement or to receive any relief under the Class Action Settlement Program if it is approved by the Court, but you may, under certain circumstances, be entitled to receive relief under the Task Force Plan. See "Interaction Between the Task Force Plan and the Class Action Settlement Program" below.

10. HEARING ON PROPOSED SETTLEMENT, RIGHT TO OBJECT TO PROPOSED SETTLEMENT AND RIGHT TO APPEAR

The Court will hold a hearing to consider whether to approve the proposed settlement and to determine the amount of attorneys' fees and expenses to award to Plaintiffs' counsel. **The hearing will be held on January 21, 1997, at 10:00 a.m., in the Courtroom of Judge Alfred M. Wolin, located at the Martin Luther King, Jr. United States Courthouse, 50 Walnut Street, Newark, New Jersey.**

If you choose to remain in the Class with respect to one or more Policies, you may file with the Court a written objection to any aspect of the proposed settlement.

Any Policyholder who has not filed a written request for exclusion for all of his or her Policies, and who complies with the procedures described in this Section, may object to the fairness, reasonableness or adequacy of the proposed settlement or the award of attorneys' fees. Policyholders may do so either on their own or through an attorney hired at their own expense. If you hire an attorney to represent you at your own expense, your attorney must (i) file a Notice of Appearance with the Clerk of the Court and (ii) send a copy to counsel for Plaintiffs and Prudential at the addresses provided below.

If you wish to submit written objections to the proposed settlement, you or your attorney must prepare and submit at least one document:

- A statement of the objections, as well as the specific reasons, if any for each objection, including any legal support you wish to bring to the Court's attention and any evidence you wish to introduce in support of your objections.

Policyholders may obtain access, at their own expense, to the deposition transcripts and attached exhibits as well as to all other documents generated in this lawsuit by entering into the Stipulation of Confidentiality governing these documents. These documents will be made available at the offices of Milberg Weiss Bershad Hynes & Lerach LLP at One Pennsylvania Plaza, New York, New York 10119-0165 and at 600 West Broadway, 1800 One

America Plaza, San Diego, California 92101-5050, and at the offices of Much Shelist Freed Denenberg Ament Bell & Rubenstein, P.C., 200 North LaSalle Street, Suite 2100, Chicago, Illinois 60601.

YOU MUST FILE ANY PAPERS AND EVIDENCE WISH THE CLERK OF THE COURT *AND* SERVE THOSE PAPERS AND EVIDENCE ON THE ATTORNEYS FOR PLAINTIFFS AND PRUDENTIAL SO THAT THEY ACTUALLY RECEIVE SUCH PAPERS AND EVIDENCE NO LATER THAN DECEMBER 19, 1996.

In addition, any Policyholder who submits written objections, as described above, may appear at the hearing, either in person or through personal counsel. Policyholders making an appearance will be heard to the extent allowed by the Court. The Court may adjourn the hearing on the proposed settlement to a new date and time without further notice to you or other Policyholders. Therefore, you (or your personal counsel) should check with the Clerk of the Court before appearing at the hearing.

If you intend to request permission to address the Court at the hearing, you must prepare and submit a notice from you (or your counsel) requesting permission to address the Court at the hearing.

IF YOU WISH TO RECEIVE COPIES OF THE PAPERS IN SUPPORT OF THE SETTLEMENT, YOU SHOULD FILE A NOTICE OF APPEARANCE ON OR BEFORE NOVEMBER 20, 1996, AND REQUEST THAT YOU BE PROVIDED WITH PAPERS IN SUPPORT OF THE SETTLEMENT.

Objections received after December 19, 1996 will not be considered by the Court. You will remain a member of the Class and will be bound by the orders and judgments in this action regardless of how the Court rules on your objections.

The papers to be filed with the Clerk of the Court (copies of which must also be served on counsel for Plaintiffs and Prudential, as set forth below) must be sent to the following addresses and must be received by the Court and all three of the undersigned Counsel by December 19, 1996:

(1) Clerk of the Court
United States District Court
District of New Jersey
P.O. Box 854
Newark, New Jersey 07101-0854

(2) Melvyn I. Weiss, Esq.
Milberg Weiss Bershad Hynes & Lerach LLP
One Pennsylvania Plaza
New York, New York 10119-0165

and

(3) Michael B. Hyman, Esq.
Much Shelist Freed Denenberg
Ament Bell & Rubenstein, P.C.
200 North LaSalle Street
Suite 2100
Chicago, Illinois 60601

Co-Lead Counsel for Plaintiffs and the Class

Answers to Questions You May Have About the Class Action Settlement

Please review the following Questions and Answers for additional information concerning the terms, restrictions and operation of, and your eligibility for, the different options under this program. The Claimant Support Team is available at 800-736-8913 (for Telecommunication Device for the Deaf, call 800-782-1863) to answer any questions you may have about this program. Do not call the Clerk of the Court, or the Court, where the Class Action is pending.

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General Facts About the Class Action Settlement

1. Why did I receive this Notice in the mail?

Our records indicate that you currently own or have owned in the past a permanent (whole life) insurance policy or policies issued from January 1, 1982 through December 31, 1995 by Prudential. Policyholders who bought these policies may be eligible to receive relief under the terms of a settlement of a class action lawsuit and under agreements reached with 43 states and the District of Columbia.

2. What is a class action lawsuit?

A class action lawsuit is a suit brought by one or more individuals who are representative of all others, known as members of the class, who may have similar claims.

3. Does this mean that I have been sued?

No. you are not being sued. Because you own or owned a permanent (whole life) policy issued during the period January 1, 1982 through December 31, 1995, you are a member of the class which is bringing the lawsuit against Prudential (the "Class") in the United States District Court for the District of New Jersey (the "Court").

4. What claims were made against Prudential in this lawsuit?

The lawsuit makes several claims about how certain whole life insurance policies were sold. Generally, the lawsuit alleges misrepresentations in the sale of such life insurance policies concerning, among other things:

(i) the use of an existing policy's cash value or divident or interest stream to pay for

any other policy (sometimes referred to when misrepresented as "twisting" or "churning");

(ii) in an abbreviated payment plan sale, the number of out-of-pocket cash premium payments required to be paid for a new policy (sometimes referred to as "vanishing premium");

(iii) the benefits that will be available upon payment of a specified number of cash premium payments; and

(iv) that the product being sold was solely an investment or savings vehicle rather than a life insurance policy.

5. Why is this lawsuit being settled?

The parties involved – the plaintiffs and Prudential – are settling this lawsuit because they believe that the relief provided under the terms of the settlement is in the best interest of Prudential's policyholders.

6. What relief is available under the settlement?

The settlement offers to eligible policyholders either (a) an Alternative Dispute Resolution ("ADR") Process or (b) Basic Claim Relief. The ADR Process allows policyholders who believe the available evidence will show they were misled about the sale or operation of their policies to pursue a claim for relief by submitting their evidence to an impartial decision-maker who will evaluate the claim based upon objective standards, all without cost to the policyholder. Alternatively, Basic Claim Relief, for eligible policyholders, consists of loans at reduced interest rates to pay premiums ("Optional Premium Loans"),

Enhanced Value Policies, Enhanced Value Annuity contracts and Mutual Fund Enhancement (when available), without requiring policyholders to claim or show they were misled about the sale or operation of their policies. The ADR Process and each of these Basic Claim Relief options is described in detail in these Questions and Answers, as well as in the Summary of Relief Available Under the Proposed Settlement.

7. Am I a policyholder eligible for relief under the settlement?

You are eligible for relief under the settlement provided that you have, or had at the time of your policy's termination, an ownership interest in a Prudential individual whole life insurance policy issued in the United States from January 1, 1982 through December 31, 1995. However, the following policyholders will not be eligible:

(a) Those who previously made complaints to Prudential and signed a release while represented by an attorney when their claims were settled;

(b) Those who exclude themselves from the Class pursuant to Section 9 of the Class Notice;

(c) Those corporations, banks, trusts or non-natural entities that purchased multiple policies as part of corporate or trust-owned life insurance arrangements and under which either (i) there are 50 or more separate insured individuals, or (ii) the aggregate premiums paid in the eight years prior to the close of 1996, exceed $1 million; and

(d) Those who were issued policies in 1995 by Prudential Select Life Insurance Company of America.

8. Has the Court approved the class action settlement?

No. The class action settlement will be the subject of a Court hearing tentatively scheduled for January 21, 1997 to determine whether it is fair and reasonable and should be approved.

9. What other investigations were conducted regarding Prudential's life insurance sales practices?

In April 1995, in part in response to allegations made in the class action lawsuits, a Multi-State Life Insurance Task Force (the "Task Force"), composed of insurance regulators from across the county, was formed to conduct a broad review of past and current sales practices in the life insurance industry, including those of Prudential.

In July, 1996, the Task Force issued a report of its examination of Prudential (the "Task Force Report"). The Task Force Report concluded, in part, that some Prudential life insurance sales had been made using improper sales practices. Particularly highlighted were possible misleading sales involving the use of funds from an older policy to pay premiums on a new policy, or possible misstatements concerning the number of years premiums would be due or would have to be paid "out of pocket" on a new policy.

10. What was the result of the Task Force examination?

Along with the Task Force Report, Prudential and the Task Force agreed that Prudential would offer a remediation plan to provide relief for all Prudential policyholders with legitimate claims about their life insurance purchases (the "Task Force Plan"). The Task Force Plan established the foundation for the remediation plan agreed to by the plaintiffs and Prudential in the settlement of this class-action lawsuit. The lawyers representing the Class and Prudential then agreed to provide, among other modifications to the Task Force Plan, additional provisions governing the scoring of claims and additional remedies for policyholders under certain circumstances, as part of the class-action settlement. In order to provide the increased relief to the residents of their states and to avoid any possible confusion from multiple mailings of different programs, it is anticipated that the states that accepted the Task Force Plan will agree to allow Prudential to wait until February 1, 1997 – after the scheduled Court hearing on the settlement – to start to implement a remediation plan. If the Court rejects or has not approved the settlement by February 1, 1997, Prudential will begin to implement the Task Force Plan in those states that have accepted it, which includes some but not all of the relief of the class action settlement. See Answer No. 12.

11. Will the state insurance departments play a role in the settlement?

The Departments of Insurance of 43 states and the District of Columbia that accepted the Task Force Plan will continue their involvement in the remediation program, even if it is part of the class action settlement, through

representatives who will monitor and provide oversight to the ADR Process as members of a Regulatory Oversight Staff.

12. When can I obtain the relief from the settlement?

Prudential and the plaintiffs have agreed to make most of the provisions of the settlement available to Policyholders as soon as the settlement receives Court approval, even if there is an appeal. However, certain additional remediation amounts and various financial guarantees and minimum payment obligations will only be available as part of the ADR Process if and when the settlement has been finally approved on appeal. For example, Prudential guarantees as part of the class action settlement that it will spend at least $410 million on the remedies to be provided in the ADR Process. The Mutual Fund Enhancement and certain additional contributions to the Enhanced Value Policy and the Enhanced Value Annuity will also not be available until appellate approval.

If the Court has not ruled on the settlement by February 1, 1997, Prudential has agreed with the states to start to implement the Task Force Plan in those states that have accepted the Plan. This plan will include the additional provisions governing claims scoring and remedies from the class action settlement. But (absent subsequent Court approval), the Plan will not include the provisions concerning the monitoring role in the remediation process of the lawyers representing the Class and the claimant representative, the Basic Claim Relief enhancements (described in preceding paragraph), or the additional remediation amounts, financial guarantees or the minimum payment obligation contained in the Class action

settlement. This additional relief and these procedural safeguards depend on Court approval followed by appellate approval.

13. If the Court rejects the class action settlement at any time, may I still obtain the relief provided in the settlement?

If the Court rejects the settlement, but the department of insurance in the state or district where you reside has accepted the Task Force Plan (described in Answer No. 10), you will be able to obtain the benefits of the revised Task Force Plan described in the previous Answer No. 12, but you will not obtain the benefit of the monitoring and advocacy by lawyers for the Class and the claimant representative, and the additional remediation amounts, financial guarantees, the minimum payment obligation and the Basic Claim Relief enhancements (described in Answer No. 12) in the class action settlement.

14. If I have more than one policy, am I required to select the same type of relief for each policy?

No. If you have more than one policy, you are not required to elect the same type of relief for each policy or to accept relief on one or all of the policies you own.

15. What is the difference between the ADR Process and Basic Claim Relief?

The ADR Process requires that you submit a claim that you were misled in connection with the sale or operation of your policy. In addition, it may provide greater relief than is provided by Basic Claim Relief if the available evidence supports the claim. The scope of the relief available through the ADR Process is more fully described in

Answer No. 29. If the available evidence does not establish that you were misled, there is no guarantee that you will receive any relief in the ADR Process. On the other hand, if you wish to receive Basic Claim Relief, i.e., an Optional Premium Loan, an Enhanced Value Policy, an Enhanced Value Annuity or Mutual Fund Enhancement (when available), you do not have to claim or show any evidence of wrongdoing.

16. If I am the insured or the beneficiary of a policy, but not the owner, am I eligible for the settlement relief?

No. Only the owner(s) of a policy is eligible for relief under the program. However, if you have, or had at the time of your policy's termination, an ownership interest in a policy, you may be eligible for relief, whether or not you are also the insured or beneficiary of the policy.

17. If an eligible policyholder is deceased, can his or her legal representatives still participate in the settlement?

Yes. If a policyholder is eligible (as described in Answer Nos. 10 and 16) but is deceased, a claim can be made in the ADR Process by the person or entity currently representing the legal interest of the deceased policyholder. Depending on the circumstances, this may be the deceased policyholder's executor or authorized personal representative in connection with an estate or other administration of the deceased policyholder's property.

18. Am I required to remain a member of the Class and participate in the settlement?

No. You may exclude yourself from the Class if you do not wish to be a member of the Class and do not wish to receive the relief provided by the settlement. If you want to exclude yourself from the Class for one or all of your policies, you must follow the procedures described in Section 9 of the Class Notice. The procedures require you to submit your exclusion request to the Court in writing. It must be postmarked by December 19, 1996. Please be sure to follow all the procedures carefully or your decision to exclude yourself will not be effective.

19. If I choose to participate in the settlement, will I have to pay attorneys' fees to the lawyers representing the Class?

No. As part of the settlement. Prudential has agreed to pay the attorneys' fees to the lawyers representing the Class.

20. Will any fees and costs awarded to the attorneys representing the Class reduce, diminish or affect the remedies provided to policyholders under the settlement?

No. Any attorneys' fees and costs awarded by the Court to the attorneys representing the Class will be paid by Prudential, and will *not* reduce, diminish or affect any remedies provided to such persons under the settlement.

21. If I choose to be excluded from the Class may I still participate in the settlement?

No. If you choose to be excluded from the Class you cannot participate in the settlement described in these

materials. However, in the event the class action settlement is rejected by the Court and you reside in a state in which the Task Force Plan has been accepted by your state's department of insurance, you may be eligible to participate in the Task Force Plan.

22. Will I still have the right to sue if I participate in the settlement?

No. Unless you exclude yourself from the Class pursuant to Section 9 of the Class Notice, you will be automatically prevented from bringing your own lawsuit or other action against Prudential based upon the sale, servicing or operation of your policy. If you want to participate in the settlement, you should not exclude yourself from the Class. If you want to sue Prudential separately, you should exclude yourself from the Class.

23. Do I have to choose now between participating in the ADR Process *or* selecting Basic Claim Relief?

No. If you do not exclude yourself from the Class (see Answer No. 18), you will receive an election form if and when the Court approves the settlement or pursuant to the state Task Force Plan in those states that have accepted the Plan. The election form will provide you a choice of either participating in the ADR Process *or* electing Basic Claim Relief. Even if you remain a member of the Class you may decide upon receipt of the election form not to elect either form of relief (ADR Process or Basic Claim Relief); however, if the Court approves the settlement you will have given up your right to bring a lawsuit or other action against Prudential as described in

Answer No. 22. Any choice which you make will be up to you.

24. Will there be independent reviews of the remediation program and policyholder claims?

The entire remediation program will be monitored by lawyers representing the Class, by state insurance regulators and by independent auditors. Any policyholder who files a claim in the ADR Process and is dissatisfied with the outcome is entitled to a review by an independent decision-maker selected and approved by state insurance regulators and lawyers representing the Class, and not affiliated in any way with Prudential. A Policyholder Representative, from a group of qualified persons approved by state insurance regulators and the attorneys representing the Class, will be available to represent the claimant before the independent decision maker. In addition, if the Court approves the settlement, the lawyers representing the Class will appoint an individual, experienced in commercial dispute resolution or the life insurance industry, to monitor the ADR Process on behalf of policyholders submitting claims (the "Claimant Representative").

25. Will there be tax consequences if I participate in the settlement?

There may be tax consequences from your participation in the settlement. They will depend on your individual circumstances. Prudential cannot provide you with tax advice about any personal tax issues that participation in this program may raise for you. You should consult with

your tax advisor as to any tax concerns that you may have.

26. Who can I call if I have questions about the settlement?

A Claimant Support Team, independent of Prudential and approved by state insurance regulators and lawyers representing the Class, is available to assist you in understanding the program and may be contacted at 800-736-8913 (for Telecommunication Device for the Deaf, call 800-782-1863).

Alternative Dispute Resolution Process

27. What is the Alternative Dispute Resolution Process?

The ADR Process offers an opportunity for policyholders who believe they were misled in connection with the sale, servicing or operation of their policies to pursue and resolve their claims without the costs, difficulties and delays of traditional litigation.

28. What is the basis for relief under the ADR Process?

The strength of the evidence you submit with your claim, records of the company and the specifics of your claim will determine the relief offered to you under the ADR Process. The determination will be made pursuant to the remediation program established under the terms of the settlement. If the evidence is insufficient to establish your claim, you may receive an offer of Basic Claim Relief or no relief at all.

29. What is the range of relief available under the ADR Process if the evidence supports my claim?

Examples of available relief are as follows:

- Financed Insurance Claims – If the evidence shows that you were misled in connection with a Financed Insurance sale (one that generally involves the use of loans, dividends or values of existing policies to pay premiums on a new policy), your remedies may range from the return of policy values improperly used, to the cancellation of the new policy and receipt of a refund of some or all of the premiums you paid, including some amount of interest. Misrepresentations in connection with a Financed Insurance sale are sometimes referred to as "twisting" or "churning".

- Abbreviated Payment Claims – If the evidence shows that you were misled in connection with a sale involving Abbreviated Payment (one that generally involves the use of a policy's dividends or policy values to pay premiums on the same policy), your remedy may include not making out-of-pocket payments for some or all of the premiums you paid, or you may be allowed to cancel your policy and receive a refund of some or all of the premiums you paid, including some amount of interest. These sales are sometimes referred to as "vanishing premium" sales.

- Investment Product Claims – If the evidence shows you were misled about whether the sale was of a life insurance policy, rather than an investment, savings or retirement

product, and you did not know you were purchasing life insurance, you may be allowed to cancel your unwanted policy and receive a refund of some or all of the premiums you paid, including some amount of interest. Or, you may be able to exchange your policy for an annuity to be purchased with the amount otherwise available for refund.

- Other Claims – Claims in which the evidence shows other improper sales may be remedied through the cancellation of your policy with a refund of some or all of the premiums you paid, including some amount of interest, or the issuance of a substitute product purchased with the amount otherwise available for refund.

30. What evidence can I provide to support my claim?

You will have the opportunity to answer questions and provide your own statement about the sale or operation of your policy on the claim form Prudential will send you. You should submit copies of any documents or records you have supporting your claim. Your answers and statements on the claim form are "evidence" which will be considered in evaluating your claim, regardless of whether you have any documents or records to submit. You should retain the originals of all documents submitted. It is very important that you submit copies of all documents you think should be considered in connection with your claim. You should be as thorough and complete as possible.

31. When do I have to file my claim?

If you do not elect to be excluded from the settlement, and if the Court has approved the settlement, you will receive an election form asking you to select the ADR Process or the Basic Claim Relief options available to you. If you select the ADR Process, you will be sent a claim form, approved by the Court, which will contain specific instructions. The information accompanying the claim form will describe how to contact the "Claimant Support Team" for assistance in completing the claim form.

If the settlement is rejected by the Court or is not approved by February 1, 1997, and you reside in a state in which the department of insurance has accepted the Task Force Plan, you will receive an election form and claim form for the Task Force Plan (if you select the ADR Process pursuant to the Task Force Plan) (See Answer No. 12).

32. How will claims submitted to the ADR Process be decided?

You will submit your claim to Prudential, which will investigate the claim and review the materials you submit, plus relevant information from the company's records, including information regarding your policy, and information from the agent who sold you the policy. The number of other sales-related complaints against your agent may also be considered in evaluating your claim. A determination will be made based solely on the terms and requirements of the settlement, which includes a number of objective criteria, as to whether your claim merits relief and, if so, what relief will be offered to you.

33. Who will evaluate my claim?

The first evaluation will be conducted by trained individuals from Prudential's professional staff who have had no involvement in the sale of life insurance policies. Those persons will be monitored by state insurance regulators and the Claimant Representative (who is selected by lawyers representing the Class). Any claim not receiving the highest relief will receive a separate review by independent claim evaluators having no affiliation or connection to Prudential, and who will be approved by insurance regulators and lawyers representing the Class. Those independent claim evaluators will make recommendations to Prudential, and then Prudential will send you a decision regarding your claim.

34. What can I do if I am not satisfied with Prudential's decision and want a new review by an independent reviewer?

If you are not satisfied with Prudential's decision and want to have it reconsidered, you may ask that an independent decision-maker review your claim. The decision-maker's determination may result in an award of relief that is greater or less than the relief originally offered to you. The decision-maker will be selected by insurance regulators and lawyers representing the Class, from lists of persons satisfactory to insurance regulators, the lawyers representing the Class, Prudential and the Court, and will not be affiliated with Prudential in any way. This independent reviewer will not give any deference to the original decision made by Prudential; rather, the new reviewer will separately consider and review your claim based on the available evidence. In virtually all circumstances, the decision-maker's decision will be final and

will not be subject to further review, including review by any court.

35. Will I receive assistance with the review by the independent decision-maker?

Yes. A representative, selected by lawyers representing the Class and approved by state insurance regulators, will be available to you at no cost to you. This representative shall be a qualified professional familiar with the life insurance industry and/or alternative dispute resolution procedures. The representative will (i) assist you in preparing for the review process, and (ii) if requested by you, will appear in person or by telephone at the hearing to represent you. In lieu of a representative, you may, at your own expense, retain legal counsel of your own choosing to appear with and/or represent you at the hearing. You may also appear on your own behalf, without a representative.

36. Do I need to continue paying premiums on my policy while my claim is being evaluated?

Yes. In order to keep your policy in force, you must continue to pay premiums. However, the failure to keep your policy in force will not disqualify you from participation in the settlement if you are otherwise eligible.

Basic Claim Relief

37. What is Basic Claim Relief?

Basic Claim Relief provides relief options to policyholders who do not have to show that they were misled about the sale or operation of their policies. These relief options include: Optional Premium Loans, Enhanced Value Policies, Enhanced Value Annuities or a Mutual Fund Enhancement. Each of these relief options is described in greater detail below.

OPTIONAL PREMIUM LOANS

38. What is an Optional Premium Loan?

An Optional Premium Loan is a loan that Prudential is making available to policyholders, at a rate (reset quarterly) that is equivalent to Prudential's unsecured short-term cost of borrowing, for the purpose of making out-of-pocket premium payments. The rate may vary up or down depending on when the loan is taken and may also vary during the time the loan is outstanding. For example, in October, 1996, the Optional Premium Loan interest rate would have been 5.59%. These loans may be taken even if you also elect to purchase an Enhanced Value Policy, an Enhanced Value Annuity or a Mutual Fund Enhancement (when available). You may not receive an Optional Premium Loan if you elect to participate in the ADR Process.

39. What are the requirements to receive an Optional Premium Loan?

Your election form will indicate whether you are eligible for an Optional Premium Loan. To receive an Optional

Premium Loan, you must: (i) have a complete ownership interest in an active policy issued from January 1, 1982 through December 31, 1995, (ii) not elect to participate in the ADR Process with respect to this policy, and (iii) satisfy the following conditions:

(a) The policy must have, at the time the loan is made, a cash value equal to or greater than the sum of (i) any Optional Premium Loans outstanding, (ii) the amount of the Optional Premium Loan being requested, (iii) existing policy loans and other instruments outstanding, and (iv) one year's interest on the total of these obligations.

(b) The policy's cash value or death benefit has not been previously transferred or assigned and is maintained in amounts sufficient to serve as security for the obligations listed in sub-paragraph (a) above.

(c) You must agree to use the policy's dividends to purchase paid-up additional insurance for the entire period in which any Optional Premium Loans are outstanding and to repay each Optional Premium Loan in five annual payments,

Contact a member of the Claimant Support Team if you have any questions about these conditions.

40. How do I repay my Optional Premium Loan?

Each Optional Premium Loan must be repaid by the policyholder within five years from the date on which the loan is made. Each year you will be billed for an installment of one-fifth (1/5) of the amount of the original loan plus the interest on the outstanding balance.

41. What happens if I do not repay my loan?

If at the end of each year you have not repaid your required loan installment, it will be repaid by borrowing through a normal policy loan. The normal policy loan would bear interest at the rate stated in your policy. If there is an outstanding loan at the time of the death of the insured, the loan amount and outstanding interest will be deducted automatically from the death benefit of the policy.

42. Are there limits to the use of an Optional Premium Loan?

Yes. The Optional Premium Loan can only be used to pay the annual premiums on your Prudential permanent or whole life policy for which you elected the Optional Premium Loan. If you choose to obtain an Optional Premium Loan, you will be notified in writing as to the number of possible annual loans you may take. The number of possible annual loans will range between 2 and 6 depending on the year your policy was issued.

43. Are there tax consequences regarding an Optional Premium Loan?

While unlikely, there is some risk that the Optional Premium Loan could be considered below market rate loan for Federal income tax purposes. In such event, the difference between the Optional Premium Loan interest rate and a specified Federal short-term interest rate generally based on the average market yield of United States Treasury obligations with maturities of three years or less, if any, would reduce your cost basis for tax purposes in your policy, or result in taxable income in the event there is no remaining cost basis in your Policy. Your cost basis

in your policy is important because it determines what portion of distributions under the policy may be taxable. Moreover, as with any loan secured by your policy, an Optional Premium Loan may be wholly or partially taxable to you if your policy is a Modified Endowment Contract (as defined by the Internal Revenue Code) at the time you receive an Optional Premium Loan or, in some circumstances, if your policy becomes a Modified Endowment Contract following your receipt of an Optional Premium Loan. You may also be subject to a 10 percent penalty tax on the taxable amount. Please consult your tax advisor if your policy is a Modified Endowment Contract at the time you request any Optional Premium Loan, or if you consider making any material changes to your policy after you receive an Optional Premium Loan.

ENHANCED VALUE POLICY

44. What is an Enhanced Value Policy?

An Enhanced Value Policy is a new whole life insurance policy which you may purchase that Prudential will enhance by paying for additional insurance coverage. Prudential will buy you this additional life insurance coverage by spending:

- an amount equal to 50 percent of your first annual premium in the first year;
- an amount equal to 25 percent of your first annual premium in the third year;
- an amount equal to 25 percent of your first annual premium in the fifth year; and

- an amount equal to 15 percent of your first annual premium in the seventh year (Prudential's purchase of additional life insurance coverage in the seventh year will be available only if and when the Court approval of the Class action settlement is upheld on any appeal).

This means, for example, that if you buy an Enhanced Value Policy and the first annual premium on the policy is $500, Prudential will spend $250 in the first year, $125 in the third year, $125 in the fifth year, and $75 in the seventh year to purchase additional life insurance coverage for you.

This enhancement will increase the death benefit protection of this policy at no additional cost to you. In addition, your application for an Enhanced Value Policy will be evaluated according to liberalized underwriting requirements. The Policyholder and insured must be the same as on the policy for which you elect relief, and you are required to pay each year the scheduled premiums on any Enhanced Value Policy you purchase.

45. Am I eligible to apply for an Enhanced Value Policy?

You are eligible for an Enhanced Value Policy provided that you do not elect, with respect to each policy, to participate in the ADR Process or apply for an Enhanced Value Annuity or Mutual Fund Enhancement (when available), and so long as:

(a) You have an in-force policy with outstanding policy loans equal to or in excess of (i) three annual policy premiums and (ii) 75

percent of the policy's total cash surrender value; or

(b) Your policy has lapsed or has terminated without death benefits being paid.

46. How do I pay the premium on my Enhanced Value Policy?

You may choose any one of Prudential's standard premium payment modes – annual, semi-annual, quarterly or monthly. The enhancement payments will not be made to buy more life insurance coverage for your Enhanced Value Policy until you have paid an amount equal to the annual premium each year.

47. How much insurance can I buy with an Enhanced Value Policy?

You may purchase an Enhanced Value Policy equal to the face amount of your original policy, but generally not exceeding $1 million.

48. Will there be any underwriting prior to the issuing of my Enhanced Value Policy?

Yes. Prudential will ask you questions about your health and financial needs. Under certain circumstances you may also be asked to undergo some medical tests. However, the underwriting will be less rigorous than typically applied to the purchase of a new policy.

49. If I am in poor health will my Enhanced Value Policy be affected?

Possibly. Based on the medical information learned in the underwriting process, Prudential may issue your Enhanced Value Policy with an extra charge known as a

rating. It will be up to you to decide whether you wish to accept the insurance coverage and pay the additional premium or reject the Enhanced Value Policy.

50. What if I am found not to qualify for the Enhanced Value Policy or I decide not to accept the Enhanced Value Policy?

You would be issued a new election form to select a different form of relief if:

(a) you were found not to qualify under the underwriting guidelines for an Enhanced Value Policy;

(b) you were issued an Enhanced Value Policy with a rating and decide not to accept such insurance coverage; or

(c) you do not accept the Enhanced Value Policy within the review period required under applicable law.

ENHANCED VALUE ANNUITIES

51. What is an Enhanced Value Annuity?

An Enhanced Value Annuity is an annuity which you may purchase and which Prudential will "enhance" by a payment credited to the annuity at the end of the first and second contract years. This enhancement will increase the value of this annuity at no additional cost to you. Specifically, if you purchase an Enhanced Value Annuity and your initial payment was less than $25,000, Prudential will pay into the annuity an additional 2 percent of the initial payment. If your initial payment was between $25,000 and $50,000, Prudential will credit the annuity with a payment equal to 3 percent of the initial

payment. In either case, Prudential will pay into the Enhanced Value Annuity another 2 percent of the initial payment at the end of the second year. In addition, if the Court approval of the Class action settlement is upheld on appeal. Prudential will pay another 1 percent of the initial premium into the annuity at the end of the third year.

The Enhanced Value Annuity has several important features:

First, an Enhanced Value Annuity is a non-qualified annuity. This means that the annuity cannot be an individual retirement annuity (IRA) or part of a qualified plan. Consult your tax advisor for more information about IRAs or qualified retirement plans.

Second, an Enhanced Value Annuity is a deferred annuity. This means that the payments under the annuity would commence at a future date rather than immediately.

Third, there are limits to the amount of initial payment that will receive an enhancement under the Enhanced Value Annuity. You may not pay an aggregate amount for any Enhanced Value Annuity and/or Mutual Fund Enhancement greater than the maximum amount of initial payment set forth below:

If The Face Amount Of Your Original Policy Was:	The Maximum Amount Of Your Initial Payment Subject To Enhancement Is:
Less than $100,000	$10,000
From $100,000 to $249,999	$20,000
From $250,000 to $999,999	$30,000
$1 million or over	$50,000

The minimum amount that you can pay for an Enhanced Value Annuity is $1,000. The maximum amount, subject to enhancement, will depend on the face amount of your original policy.

Fourth. Prudential will waive any applicable surrender charges on the initial payment and the enhancements made by the company after the later of the date (1) you reach age 59½, or (2) your Enhanced Value Annuity has been in force for at least four years.

Fifth, the owner and annuitant for the Enhanced Value Annuity must be the owner of the policy for which you elect relief, unless the owner is not an individual (e.g. a corporation or trust), in which event the owner and annuitant must be the insured on the policy.

52. Am I eligible to elect an Enhanced Value Annuity?
Yes. You may apply for one as long as you do not, with respect to each policy, participate in the ADR Process or apply for an Enhanced Value Policy.

MUTUAL FUND ENHANCEMENTS

53. What is the Mutual Fund Enhancement?

The Mutual Fund Enhancement provides you with an opportunity to purchase shares in certain mutual funds with Prudential contributing additional fund shares. You may make these purchases following receipt of a prospectus (or prospectuses), for the certain mutual funds distributed by Prudential Securities, Inc., a subsidiary of Prudential. The prospectus (or prospectuses) will

describe in detail the expenses, charges and risks associated with the mutual fund shares. The Mutual Fund Enhancement works as follows: For each purchase of these shares by the policyholder, Prudential will "enhance" the amount of the initial purchase with a financial contribution to purchase additional shares equal to 4% of the amount of such purchase. The mutual fund shares will be offered subject to a contingent deferred sales charge, as described in the relevant prospectus, that generally decreases to zero over a period of approximately six years. Your initial purchase of mutual fund shares must be no less than $1,000, or such other amount as set forth in the applicable prospectus, and the amount entitled to receive the enhancement is subject to the following limits:

Policyholder's Policy Face Amount	Maximum Policyholder Initial Purchase Amount Subject To Enhancement
Less than $100,000	$10,000
From $100,000 to $249,999	$20,000
From $250,000 to $999,999	$30,000
$1 million or over	$50,000

You may not pay an aggregate amount for any Mutual Fund Enhancement and/or Enhanced Value Annuity greater than the applicable maximum policyholder initial purchase amount set forth above.

54. Am I eligible to elect a Mutual Fund Enhancement?

Yes. You may apply for a Mutual Fund Enhancement as long as you do not, with respect to your policy,

participate in the ADR Process or apply for an Enhanced Value Policy.

55. If I elect the Mutual Fund Enhancement, when will it become available?

You will be able to select the Mutual Fund Enhancement when electing Basic Claim Relief. However, you will have the opportunity to purchase the mutual fund shares only if and when the class action settlement is approved by the Court and upheld on appeal. If the class action settlement is rejected by the Court or not upheld on appeal, you will be notified that the Mutual Fund Enhancement will not be made available to you. In that case, if the Mutual Fund Enhancement were your only Basic Claim Relief selection, you may make another selection.

Payment and Eligibility for Basic Claim Relief

56. Can I use money in my existing policies to buy an Enhanced Value Policy, an Enhanced Value Annuity or a Mutual Fund Enhancement (when available)?

No. To obtain an Enhanced Value Policy, an Enhanced Value Annuity or a Mutual Fund Enhancement (when available), you must make the initial premium or payment with money that is not taken from an existing life insurance product issued by Prudential.

In addition, no money from a tax-qualified plan or product can be accepted as payment for an Enhanced Value Policy, an Enhanced Value Annuity or a Mutual Fund Enhancement (when available), and these cannot be issued on a tax-qualified basis.

57. What if it is determined that I am not eligible for the election that I have made?

Prudential will notify you if you are not eligible for the type of Basic Claim Relief you have elected, and you will be given an opportunity to complete a new election form.

The Claimant Support Team will be available to answer questions you may have about participation in the remediation program. Telephone representatives will be available to take your calls at 800-736-8913 (for Telecommunication Device for the Deaf, call 800-782-1863) 24 hours a day on weekdays (beginning Monday at 8 a.m.) and Saturdays from 9 a.m. to 3 p.m., your local time. Please do not contact the Clerk of the Court, or the Court where the Class Action is pending.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket Nos. 97-5155, 97-5156, 97-5193, 97-5217 and 97-5312

IN RE THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION, Richard P. Krell, Elizabeth Bajek, Amanda Bajek, Helen Bartsch, Mark Ciconte, Raymond Dolce, Margaret Dolice, Louise Duggan, Peter Duggan, Charles Duncan, Mary Howe, Mary Krell, William Morris, Diana Racer, Thomas Racer, Gweneth Reidel, Terry Sligar, Alice Smith, Jerry Smith, William Walton, Richard E. Johnson, Carl D. Helton, Rodney Grady and Janet Grady, Appellants.	On Appeal From: The United States District Court For The District of New Jersey Sat Below: Hon. Alfred M. Wolin, U.S.D.J. Docket No. Below: Civil Action No. 95-4704(AMW) MDL No. 1061

APPELLEES' JOINT APPENDIX

(Logo) **Prudential**

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July 30, 1997

Via Federal Express

Melvyn I. Weiss, Esq.
Milberg Weiss Bershad
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One Pennsylvania Plaza
New York, N.Y. 10119-0165

RE: Prudential Remediation Program – Election Form Receipts

Dear Mr. Weiss:

We wish to provide you with the information provided to state regulators concerning the number of Election Forms received on behalf of The Prudential Insurance Company of America in connection with its sales practices Remediation Program, including figures reflecting the total number of Election Forms received, further divided between those who elected Basic Claim Relief (BCR) and those who elected Alternative Dispute Resolution (ADR):

Total Election Forms Received:	1,596,263
Total ADR Elections Received:	1,103,914
Total BCR Elections Received:	492,349

Sincerely,

/s/ Deborah Bello-Monsco

A Division of the Prudential Insurance Company of America

Supreme Court, U.S.
FILED
DEC 18 1998
OFFICE OF THE CLERK

No. 98-819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD P. KRELL, *et al.*,

Petitioners,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

-and-

CAROL NICHOLSON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CAROL NICHOLSON, *et al.*

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QUESTION PRESENTED

In a unanimous opinion, the United States Court of Appeals for the Third Circuit (Scirica, J.) affirmed the opinion of the District Court (Wolin, J.), certifying a settlement class. The Petition for Certiorari challenges those rulings, and the courts' jurisdiction to make them, premised upon nothing more than previously rejected factual arguments concerning the nature of the Class Representatives' claims. The Petition also mischaracterizes the opinions below, identifies no Circuit Court conflicts, and raises no substantial legal issues. Granting certiorari would require this Court to revisit numerous findings of fact and to re-decide many of them. Accordingly, should this Court deny certiorari?

PARTIES TO THE PROCEEDING

The respondent identified in the caption to the Petition is The Prudential Insurance Company of America ("Prudential"). The respondents should also include the named class representatives, Carol Nicholson, Martin Dorfner, Vincent Kuchas, Elizabeth Kuchas, and Norman Gassman. The petitioners are objectors represented by a single law firm; their names are Richard P. Krell, Elizabeth Bajek, Amanda Bajek, Helen Bartsch, Mark Ciconte, Raymond Dolce, Margaret Dolice, Louise Duggan, Peter Duggan, Charles Duncan, Mary Howe, Mary Krell, William Morris, Diana Racer, Thomas Racer, Gweneth Reidel, The Estate of Carl J. Scalzo, Marie Scalzo, Terry Sligar, Alice Smith, Jerry Smith, and William Walton.

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104 F.R.D. 422 (E.D. Pa. 1984), *aff'd in pertinent part and vacated in part on other grounds*, 789 F.2d 996
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Other Authorities:

1 H. Newberg & A. Conte, *Newberg on Class Actions* § 3.15 (3d ed. 1992) 14

1 H. Newberg & A. Conte, *Newberg on Class Actions* § 2.05 (3d ed. 1992) 10, 12

2 H. Newberg & A. Conte, *Newberg on Class Actions* § 6.14 (3d ed. 1992) 11

7A Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1764 (2d ed. 1986) 14

7B Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1785.1 (2d ed. 1986) 10

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John Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (1995)	13
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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (Wolin, J.) is reported at 962 F. Supp. 450. The unanimous opinion of the United States Court of Appeals for the Third Circuit (Scirica, J.) is reported at 148 F.3d 283.

STATEMENT OF JURISDICTION

Jurisdiction is alleged to exist in this Court pursuant to 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

During early 1995, aggrieved policyholders throughout the country brought both individual and class actions against Prudential. From their inception, the class actions challenged the methods Prudential used to market, sell, and administer permanent life insurance policies sold during the class period. Plaintiffs alleged that Prudential management developed and implemented a fraudulent scheme to sell life insurance policies through a broad array of deceptive sales practices, which included *but were not limited to* Prudential's "vanishing premium," "churning," and "investment plan" sales tactics.

Contrary to the assertions made in the Petition for Certiorari, each of which were rejected by the District Court and by the Third Circuit, plaintiffs' allegations, and the named representatives' claims, were not limited to "vanishing premium," "churning," and "investment plan" issues. As both the District Court and the Third Circuit correctly found, Plaintiffs also sought redress for Prudential's dividend practices, which affected *all* Class Members, and for Prudential's deceptive administration of Class Members' policies to conceal

fraudulent sales and effectuate the scheme, including Prudential's use of unauthorized policy loans and similar contrivances to deplete policyholders' cash values. Plaintiffs alleged that Prudential's deceit infected the design and promotion of its insurance products, the training and supervision of its agents, the process Prudential used to declare policy dividends, Prudential's investment practices, and even the manner in which policies were serviced and administered. *See* App. 103-06 (Third Circuit finds that, in addition to vanishing premium, churning, and investment plan allegations, "other allegations address conduct which supports the common scheme theory and which does not fall neatly within the three enumerated categories"); App. 422-24 (District Court finds that "[t]he Complaint involves allegations relating to all wrongful conduct in the sale and treatment of life insurance policies"). *See also* Transcript, April 16, 1996, at 72-73 (early litigation phase hearing at which Judge Wolin characterized Complaint as including allegation that "Prudential manipulated the surplus so that . . . all 10 million policyholders did not receive a fair distribution of the surplus"); App. 194 ("Prudential engaged in a systemic fraudulent marketing scheme"); App. 314-15 ("Krell *wrongfully* alleges that the class fails for lack of typicality because no class representative claims to have been injured by 'other improper sales practices.'") (emphasis added); App. 181-90 (District Court discussion of each Class Representative's allegations).

After two years of hotly contested litigation, the parties to the class action started discussions that ultimately resulted in the class settlement. The settlement makes available to all class members economic benefits that are uncapped and undiminished by any allocation among them. The settlement includes a Basic Claim Relief ("BCR") package that permits the election of automatically-available benefits to alleviate the harms resulting from Prudential's wrongful conduct, without

any need to file a Claim Form, and an Alternative Dispute Resolution ("ADR") process that provides more tailored remedies based upon the responses to a relatively simple Claim Form crafted by plain-language experts. The ADR process permits claimants to receive full compensatory or rescissionary relief plus extra-compensatory relief similar to punitive damages.

The settlement was endorsed by the Departments of Insurance of all 50 States and the District of Columbia, many of which wrote letters to the District Court urging approval of the settlement, and all of which adopted the settlement through individual Consent Decrees.

Based on a comprehensive evidentiary record — including numerous expert affidavits and detailed documentary evidence, affidavits, and deposition testimony — the District Court (Wolin, J.), in exhaustive findings of fact and conclusions of law, certified a settlement class that is co-extensive with plaintiffs' factual and legal claims, and with the proposed settlement. Moreover, in approving the settlement, the District Court complied in full with the extremely demanding legal test set forth in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997). Before *Georgine* was affirmed by this Court, the Third Circuit required settlement classes before District Courts in that Circuit to comply with all aspects of Rule 23, including manageability at trial.

Subsequent to the District Court approval, this Court affirmed the Third Circuit's *Georgine* opinion and ruled that, if anything, the Third Circuit's approach was too restrictive, to the extent it required settlement classes to demonstrate manageability. *See Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

Armed with the benefit of this Court's *Amchem* opinion, the Third Circuit (Scirica, J.) unanimously affirmed the District Court.

Both the District Court and the Third Circuit exhaustively addressed all of the issues raised by the Petition for Certiorari, and rejected them not only on the law, but also as wrong in their factual premises. For example, the courts below rejected the false factual allegations, which are repeated again in the Petition, that the so-called "other claims" were neither pled nor prosecuted, that the Class Representatives did not assert these claims, and that the settlement expanded the class to include these previously unpled claims and claimants. *See* App. 103-06; 314-15; 194; 422-24; 181-90.

Similarly, the courts below rejected Petitioners' contention that the federal and state law fraud claims lacked a "common nucleus of operative fact." Contrary to Petitioners' argument that the facts were ignored, the courts below explicitly found that the federal and state law claims were "inextricably factually intertwined." *See* App. 267-72 (District Court finds that "the state law claims are part of the same case or controversy as the federal claims because the claims are inextricably factually intertwined"); App. 36-43 (Third Circuit finds that plaintiffs alleged a "widespread scheme," that plaintiffs alleged the scheme constituted common law fraud and violations of §§ 10(b) and 20(a) of the Securities Exchange Act, and that the claims were "inextricably intertwined").

REASONS FOR DENYING THE WRIT

The Petition merely invites this Court to act as a court of error. The Petition seeks the re-visiting of the extensive factual findings made by the District Court and affirmed by the Third Circuit, and then asks this Court to re-apply relatively settled

law to new factual findings. The Petition does not identify a single question of federal law on which there is a division among the Courts of Appeal, and raises no substantial legal issues worthy of this Court's attention. *See* Supreme Court Rule 10 (listing considerations that favor certiorari and concluding that, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

As detailed below, Petitioners' legal arguments are entirely dependent upon factual premises concerning the nature of the Class Representatives' claims that were rejected both by the District Court and by the Third Circuit. The Petition also mischaracterizes the opinions of those courts. Petitioners' legal arguments — which for the most part are undisputed — become irrelevant if the District Court's factual findings (and the Third Circuit's affirmance of those findings) concerning the nature and breadth of the Class Representatives' claims are left undisturbed.

For example, Petitioners challenge both federal jurisdiction and standing because, they argue, "[t]he Settlement Agreement expanded the Class to include millions of policyholders who had no pled claims." Petition at 5. Yet, from the very beginning of the litigation, the District Court recognized that plaintiffs' complaint alleges that "Prudential manipulated the surplus [during the class period] so that . . . all 10 million policyholders did not receive a fair distribution of the surplus." Transcript, April 16, 1996, at 72-73. (873-74 of Third Circuit Appendix). *See also* App. 103-06; 314-15; 194; 422-24; 181-90. Similarly, arguing that the federal and state law claims lack what the Petition calls "factual interdependence," the Petition completely ignores the factual findings below that the federal and state law claims were "inextricably factually intertwined." App. 267-72; App. 36-43.

Thus, the Petition presents no issues worthy of certiorari review.

I.

THE COURTS BELOW PROPERLY MADE FACTUAL FINDINGS THAT THE FEDERAL AND STATE LAW FRAUD CLAIMS AROSE FROM A "COMMON NUCLEUS OF OPERATIVE FACT" AND WERE "INEXTRICABLY FACTUALLY INTERTWINED"

Ignoring the factual findings below, the Petition challenges federal subject matter jurisdiction. But it is undisputed that plaintiff Dorfner properly asserted federal subject matter jurisdiction: his Prudential VAL policy was a registered security sold pursuant to a prospectus, and Dorfner asserted that the sale constituted fraud under the federal securities laws.

With federal question jurisdiction established, the District Court reviewed the factual relationship between the federal and state law claims, and then properly exercised supplemental jurisdiction under 28 U.S.C. § 1367 over the remaining state law claims and claimants. 28 U.S.C. § 1367 confers jurisdiction over the entire "case or controversy," and directs that federal courts "shall" hear all claims that are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy," unless one of the express exceptions set forth in § 1367(c) — none of which were urged below or are urged in the Petition — applies. Claims are part of the same case or controversy if they derive from a "common nucleus of operative fact" and "are such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding." *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).[1] The

1. *See also MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1102 (3d Cir. 1995), *cert. denied*, 117 S. Ct. 64 (1996) (citations omitted); *Lyon v. Whisman*, 45 F.3d 758, 760-61 (3d Cir. 1995); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991); 13B Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 3567.1 at 32 n.9 (Supp. 1998) (citing cases).

policy reasons supporting this doctrine — judicial economy, convenience, and fairness to the parties — are particularly significant to this case: because, as Petitioner concedes, approximately 30% of the class's insurance policies were registered securities, a substantial number of legally and factually similar federal and state-law claims were resolved through a single litigation.

As discussed above, the courts below found that plaintiffs alleged that Prudential management developed and implemented a fraudulent scheme on a companywide and nationwide basis through the use of uniformly deceptive techniques. Dorfner was one of the victims. His federal claims are based on the same conduct as his, as well as all class members', state law claims. For example, the courts below found that Dorfner was churned into a vanishing premium policy, victimized by unauthorized policy loans, sold a policy that was far more interest-sensitive than disclosed, and misled by subsequent efforts to conceal the misconduct. App. 184-87. Because the same facts were found to support both the federal and state claims, supplemental jurisdiction over the state law claims was proper. App. 36-43; App. 267-72.

In the Petition for Certiorari, Petitioners improperly raise for the *first* time an argument they never made below: all but conceding that the *Gibbs* test is satisfied, Petitioners seem now to be arguing that *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994) and *Peacock v. Thomas*, 516 U.S. 349 (1996) create a "factual interdependence" test for pendent party jurisdiction that is more difficult to meet than the *Gibbs* test. But both cases are totally inapposite: both cases involve the doctrine of *ancillary jurisdiction* over separate, later-filed lawsuits that lack an independent basis for subject

matter jurisdiction, and neither case involves jurisdiction over absent class members or 28 U.S.C. § 1367.[2]

In any event, Petitioners then argue that the courts below did "not focus on the facts necessary to support the elements of the federal and state claims," and instead looked only "to the abstract context, including managerial encouragement of fraudulent sales practices, in which the Class Members' claims occurred." Petition at 13. As explained above, this statement is false: both courts below extensively reviewed the facts and allegations involved in the litigation, and concluded that the facts needed to prove both the federal and state law claims were "inextricably intertwined." *See* App. 267-72 (District Court finds that "the state law claims are part of the same case or controversy as the federal claims because the claims are inextricably factually intertwined"); App. 36-43 (Third Circuit finds that plaintiffs alleged a "widespread scheme," that plaintiffs alleged that the scheme constituted common law fraud and violations of §§ 10(b) and 20(a) of the Securities Exchange Act, and that the claims were "inextricably intertwined").

Moreover, although repeating in mantra-like fashion the supposed lack of "factual interdependence" between the federal and state law fraud claims, Petitioners have failed to identify even a single way in which those federal and state law fraud

2. The issue in *Kokkonen* was whether a federal court had jurisdiction to decide a lawsuit for breach of a settlement agreement, when there was no jurisdictional basis for such a lawsuit but there had been jurisdiction over the original, settled lawsuit. Similarly, the issue in *Peacock* was whether a federal court had jurisdiction over a lawsuit seeking to pierce the corporate veil for the purpose of collecting a judgment from a corporation's officer, after the corporation had lost an earlier lawsuit and attempts to collect the judgment from the corporation proved unsuccessful, when there was no jurisdictional basis for the veil-piercing lawsuit but there had been jurisdiction over the earlier lawsuit against the corporation.

claims are different, or why any minor differences, even if they exist, should defeat the finding of jurisdiction by the two courts that have examined the issue.

Finally, it is undisputed that each named plaintiff properly asserted diversity of citizenship jurisdiction — a fact buried in a footnote in the Petition. The District Court concluded that diversity jurisdiction was a valid additional basis for federal subject matter jurisdiction, App. 272-81, and, in her concurring opinion, Judge Roth would have expressly affirmed this conclusion on appeal. App. 158-60. The majority declined to reach this issue, in light of their finding of federal question jurisdiction. App. 43-50.

II.

THE COURTS BELOW PROPERLY MADE FACTUAL FINDINGS THAT THE CLASS REPRESENTATIVES ASSERT THE SAME CLAIMS AS DO THE ABSENT CLASS MEMBERS

The Petition also challenges the Class Representatives' standing to represent some or all absent class members, but once again ignores the factual findings of the courts below. Each class representative was found to have alleged viable claims against Prudential that, at least individually, gave rise to an Article III "case or controversy," thus satisfying the requirement of individual standing. Petitioners argue that plaintiffs lack standing to represent class members with what they call "other claims," because, *they assert*, the Class Representatives do not allege those claims. But as already discussed, the courts below found that the Class Representatives *did* allege so-called "other claims." *See* App. 103-06; 314-15; 194; 422-24; 181-90.

Petitioners also argue that because some class members *purportedly* did not suffer an injury-in-fact, there is no "case or controversy" as to those class members. This argument is similarly factually incorrect. *Id.* Moreover, it is also legally incorrect.

First, the presence of an Article III "case or controversy" is determined vis-a-vis the named parties in a class action. Because the Class Representatives unquestionably had standing to assert the claims they alleged, there is no need to analyze whether each absent class member also has standing. The presence of class representatives with concrete, individual claims fulfills the purpose underlying Article III's "case or controversy" requirement, which is to insure the requisite degree of adversary-ness; any further "standing"-type issues relating to absent class members simply raise questions as to whether the requirements of Rule 23 have been satisfied.[3] *See also infra* at Point III.

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3. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975) (Article III standing requirement ensures plaintiff has "a personal stake in the outcome of the controversy."); *Allen v. Wright*, 468 U.S. 737, 751 (1984). *See generally* 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 2.05, at 2-29 (3d ed. 1992) ("Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense."); *id.* at 2-41 ("Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions."); 7B Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1785.1 at 141 (2d ed. 1986) ("As long as the representative parties have a direct and substantial interest, they have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation.").

Similarly, Article III does not require proof that each absent class member sustained personalized injuries. Classes often are defined to include all purchasers of a particular product, deferring to a subsequent procedure a determination of whether particular individuals have suffered injury and what those injuries are.[4] App. 281-83. Indeed, plaintiffs are encouraged to define a class in objective terms, without regard to the merits of the claim or the seeking of particular relief.[5]

Lewis v. Casey, 518 U.S. 343, 357 (1996), is not to the contrary. In *Lewis v. Casey*, this Court held that the only injury suffered by the sole remaining class representative was caused by the defendant-prison's failure to provide special services in light of the class representative's illiteracy. Therefore, there was no class representative with standing to raise the *other* prison failings alleged in the Complaint on behalf of absent class members but not the class representative.[6] Contrary to the Petitioners' argument, this Court never rejected the notion that,

> [o]nce threshold individual standing by the class representative is met, a proper party to raise a

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4. *See, e.g., In re School Asbestos Litig.*, 104 F.R.D. 422, 424, 533-34 (E.D. Pa. 1984), *aff'd in pertinent part and vacated in part on other grounds*, 789 F.2d 996 (3d Cir. 1986) (certifying Rule 23(b)(3) opt-out class of "essentially all public school districts and private schools in the nation").

5. *See, e.g.*, 2 H. Newberg & A. Conte, *Newberg on Class Actions* § 6.14 at 661 (3d ed. 1992); *see generally Manual for Complex Litigation, Third* § 30.14 at 217-18 (1995).

6. As discussed above and again *infra* at Point III, the Third Circuit and the District Court both agree that the Class Representatives possessed and alleged the same claims that were alleged on behalf of the Class. App. 103-06; App. 422-24; App. 194; App. 314-15; App. 181-90.

> particular issue [asserted by the class representatives] is before the court, and there remains no further separate class standing requirement in the constitutional sense.

Petition at 10 (quoting App. at 53 and 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 2.05, at 2-29 (3d ed. 1992)).

Second, even if Article III were construed to require that all absent class members have sustained some injury-in-fact, and that this be demonstrated as a prerequisite to class certification, this standard is met. To have standing under Article III, the plaintiff need only allege "distinct and palpable" harm rather than wholly "abstract," "conjectural," or "hypothetical" injury.[7] The injury alleged "need not be large, [as] an identifiable trifle will suffice" to confer standing.[8]

In this case, the courts below found that the nature of Prudential's alleged deceptive practices — which impacted the design and pricing of its insurance products, its dividend determinations, and its investment decisions — were claimed to have injured, and did injure, all policyholders. App. 103-06; App. 422-24; App. 194; App. 314-15; App. 181-90. As found by the District Court and affirmed by the Third Circuit, the complaint alleged that Prudential's misconduct injured all class members, and plaintiffs' discovery substantiated that Prudential's misconduct injured all class members. *Id.* These injuries include economic damages in the form of premium overcharges, lower dividends, lost death benefits, diminished

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7. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

8. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973).

cash values, and excessive policy charges. *Id.* These present injuries, some or all of which, the courts below found, were properly alleged to have been incurred by all class members, *id.*, are more than sufficient to confer Article III standing. *See also* Transcript, April 16, 1996, at 72-73 (Judge Wolin recognizes Complaint as alleging that "Prudential manipulated the surplus so that . . . all 10 million policyholders did not receive a fair distribution of the surplus").

Third, even if standing must be shown with respect to all absent class members and some segment of the class could be characterized as "uninjured" claimants in the sense of not having a measurable economic loss — a conclusion that is wholly at odds with the complaint and the undisputed record — Article III standing nevertheless is satisfied. Present economic damages are not required to state a cognizable claim for contractual and fraud-based claims such as those at issue in this case. Class members still would be eligible for rescission, reformation, or similar equitable remedies.[9] The uniform existence of such comparable common law claims satisfies even the most stringent reading of Article III.[10]

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9. *See, e.g.*, *Hilton Hotels Corp. v. Piper Co.*, 214 N.J. Super. 328, 336, 519 A. 2d 368, 372 (Ch. Div. 1986) (rescission is available for fraud, failure of consideration, or material breach); *Restatement of Contracts (Second)* § 164(1), at 445 (1981) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.").

10. *See, e.g.*, John Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1431 (1995) (under the "more conservative view . . . only claims that have accrued under state law . . . [are] cognizable under Article III").

III.

THE COURTS BELOW PROPERLY MADE FACTUAL FINDINGS THAT THE CLASS REPRESENTATIVES ARE TYPICAL

Reprising the same rejected and incorrect factual premises, Petitioners argue that the Class purportedly comprises myriad "abstract 'other claims,' " and that the Class Representatives therefore are not typical. Petition at 18. But both the District Court and the Third Circuit made factual findings that, contrary to Petitioners' arguments, the Class Representatives *did* possess the so-called "other claims." App. 103-06; App. 422-24; App. 194; App. 181-90. *See also* App. 64-68 (Third Circuit affirmance of District Court's typicality findings); App. 313-15 (District Court's typicality findings).

Thus, for the reasons described above and in the opinions below, Petitioners' underlying factual premises are incorrect: all Class Members' claims arise from the same common course of conduct and their claims are based on the same legal and factual theories. That is all Rule 23(a)(3) requires. *See* 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 3.15 at 168 (3d ed. 1992) ("Factual differences will not render a claim atypical if the claim arises from the same . . . course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory."); *see also* 7A Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1764 at 243 (2d ed. 1986) ("plaintiff has satisfied Rule 23(a)(3) if the claims or defenses of the representatives and members of the class . . . are based on the same legal or remedial theory").

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 18 1998
CLERK

Nos. 98-819, 98-888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD P. KRELL, *et al.*,

Petitioners,

-and-

RICHARD JOHNSON,

Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ROBERT C. WINTERS AND THE ESTATE OF ROBERT A. BECK

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Should this Court grant certiorari review to consider issues of subject matter jurisdiction, standing, typicality and adequacy of notice in connection with the settlement of a multi-billion dollar class action involving insurance sales practices, where (1) every court that has considered the Settlement, as well as the insurance regulators of every state, have found it to be fair and reasonable; (2) the issues on which petitioners seek review all rest on well documented factual findings of the district court which were affirmed by the Court of Appeals for the Third Circuit; and (3) the rulings of the courts below apply long established legal principles as to which there are no conflicts among the circuits.

PARTIES TO THE PROCEEDING

The respondent identified in the captions to the petitions is The Prudential Insurance Company of America ("Prudential"). The respondents should also include defendants Robert C. Winters and The Estate of Robert A. Beck, as well as the class representatives: Carol Nicholson, Martin Dorfner, Vincent Kuchas, Elizabeth Kuchas and Norman Gassman.

STATEMENT PURSUANT TO RULE 29.6

Prudential is a mutual insurance company. To the extent it is required to respond to Supreme Court Rule 29.6, Prudential states that it does not have any parent companies. Prudential has numerous wholly owned subsidiaries. The following are Prudential's nonwholly owned subsidiaries:

745 Property Investments
Prudential Mortgage Asset Corporation II
Prudential of America Life Insurance Company (Canada)
Preferred Coastal Realty, Inc.
Bache & Co. S.A. de C.V. (Mexico)
Lapine Holding Company
Lapine Development Corporation
Lapine Technology Corporation
Prudential Securities (Brazil) LTDA
Prudential-Bache International (Hong Kong) Ltd.
Prudential Bache Futures (Hong Kong) Limited
Prudential Bache Nominees (Hong Kong) Limited
Prudential Bache Securities (Hong Kong) Limited
Prudential Bache Finance (Hong Kong) Limited
PAMA (Indonesia) Limited
P.T. PAMA Ventura Indonesia

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COUNTERSTATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

A. The Class Settlement Presents A Unique And Unparalleled Response To The Sales Practices Claims Of Prudential Policyholders.

Although this case, and the Settlement which resolved it, involve significant dollar amounts, the few legal issues the remaining objectors seek to raise before this Court are not significant at all. They involve application of long standing legal principles to well established facts and present no issues worthy of certiorari review. The class action Settlement is now being contested by just two groups of objectors, both represented by counsel with competing putative class actions against Prudential. The Settlement was approved by the district court and a unanimous panel of the Third Circuit Court of Appeals, the same court that had issued the seminal class action settlement decision affirmed by this Court in *Amchem Prods., Inc. v. Windsor*, __ U.S. __, 117 S. Ct. 2231 (1997).[1] Following its review and consideration of the voluminous record, including a panoply of objections, the district court held — and the Third Circuit, applying this Court's decision in *Amchem*, affirmed — that the Settlement was fair, reasonable and adequate "beyond a doubt" (App. 178; 962 F. Supp. at 468) and indeed, "exceptional" (App. 81; 148 F.3d at 317), and that the Settlement class was properly certified.[2] (App. 79; 148 F.3d at

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1. The Third Circuit's opinion and order in this case is attached as volume 1 of the Appendix to the petitions, and is reported at 148 F.3d 283 (3d Cir. 1998). The district court's opinion and order in this case is attached as volume 2 of the Appendix to the petitions, and is reported at 962 F. Supp. 450 (D.N.J. 1997). The applicable appendix citations ("App. __") and Federal Reporter and Federal Supplement citations are provided herein.

2. Following the procedure set forth in the Third Circuit's decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab.*

(Cont'd)

316.) The Settlement has also received unprecedented regulatory support. Insurance regulators from all 50 states and the District of Columbia — the experts charged with administering and enforcing the insurance laws of this country — have given the Settlement their "seal of approval," accepting the plan as fair and adequate to Prudential's policyholders. (App. 112-113; 148 F.3d at 329.)

Petitioners here have largely abandoned the objections they submitted below. Their remaining challenges to the district court's subject matter jurisdiction and the named plaintiffs' standing, while cloaked in language suggesting that the courts below misapplied Constitutional standards, are in reality nothing more than disputes over the factual findings of those courts as to the typicality of the named plaintiffs' claims and their ability adequately to represent the entire class. While petitioners may be dissatisfied with those factual findings, the decisions below simply applied principles of federal law, well established by this Court, to the allegations and claims at issue in this class action. In short, the petitions provide no compelling reasons to grant certiorari review and should be denied.

It is little wonder that the Settlement received the unconditional approval of the courts below. Unlike other class action cases that have come before this Court, involving limited fund settlements or the problem of future claimants, this Settlement represents an unprecedented effort to reach out to past and present Prudential policyholders and to fully remediate their claims concerning improper sales practices, without any cap on Prudential's exposure. The Settlement establishes a cost-

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(Cont'd)

Litig., 55 F.3d 768, 778 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995), Prudential stipulated to class certification for settlement purposes only, while preserving all of its legal rights, remedies and defenses. (*See* App. 92; 148 F.3d at 321.)

free alternative dispute resolution process (the "ADR" program), with multiple levels of review and specific claims scoring criteria, to remediate the claims of policyholders who believe they were misled in the purchase of their life insurance.[3] (App. 20-23; 148 F.3d at 295-96.) The ADR program provides *complete compensation* to any Class Member for whom it can be shown — either through evidence from his or her own or the Company's files, or through presumptions provided in the agreement concerning the agent's past conduct — that their purchase resulted from improper sales practices. (App. 6, 26 n.23, 96; 148 F.3d at 289, 297 n.23, 322-23.)

Prudential has committed to certain specific financial guarantees — creating a recovery "floor," not a "cap" as is common in other settlements. Prudential has agreed to expend at least $260 million for each 110,000 claims remedied (up to a total of 330,000). (App. 27; 148 F.3d at 297.) It has guaranteed a minimum cost of $410 million in remedies, no matter what the number of claimants, and has agreed to provide additional millions in further compensation beyond actual losses suffered by Class Members. (App. 27-28; 148 F.3d at 297.) Defendants have also agreed to a blanket waiver of statute of limitations and other defenses — defenses which the district court previously held constituted significant legal bars to recovery by many, perhaps most, Class Members. (*See* App. 369-70; 962 F. Supp. at 539.) Finally, Prudential will assume all of the substantial administrative expenses for the remediation plan, thus, as the Third Circuit noted, "ensur[ing] that the

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3. In addition, the Settlement includes what is termed Basic Claim Relief ("BCR") for policyholders who do not believe they were misled by Prudential or who otherwise choose not to make an ADR claim. BCR includes certain financial assistance and policy enhancements, without diverting a single dollar from the ADR claimants' possible recovery. (App. 241-42, 252; 962 F. Supp. at 490-91, 495; *see also* App. 24; 148 F.3d at 296.)

administrative and legal costs of the settlement will not diminish the class recovery." (App. 113; 148 F.3d at 329.)

Petitioner Krell questions the inclusion of an "other sales practices claims" category in the scope of possible recipients of relief under the Settlement; however, as the courts below found, these claims were properly included within the Settlement and, in fact, are integral to the goal of full remediation for injured policyholders, many of whom raise claims involving a wide range of different, but related, sales practices issues. (App. 54, 16 n.10; 148 F.3d at 307, 293 n.10; App. 314-15; 962 F. Supp. at 518-19.) There are thus no "class conflicts," for all who are injured may claim and receive, as appropriate, full, and individually tailored, compensatory relief. (App. 68-72; 148 F.3d at 312-13; App. 321-24; 962 F. Supp. at 521-22.) As the Third Circuit concluded, this Settlement is "impress[ive]" in the "nature and extent" of relief provided to Class Members because it "responds to the individual claims of the class and provides compensation based on the harm they have suffered." (App. 112; 148 F.3d at 328; *see* App. 178, 360; 962 F. Supp. at 468, 535.)

As both courts below stressed, the fairness of this Settlement and its enormous value to Class Members is the product of hard-fought litigation and arduous negotiations. (App. 12-19, 70; 148 F.3d at 292-94, 313; App. 367-68; 962 F. Supp. at 538.) The parties reached agreement only after engaging in extensive motion practice, exchanging over a million pages of documents and a vast array of other materials and conducting numerous depositions and interviews of senior Prudential personnel and experts. (App. 367 n.63; 962 F. Supp. at 538 n.63.) The compromise was reached with the benefit of legal rulings by the district court on hotly contested substantive motions which clarified for the parties the legal framework within which the case would be litigated and, for each party,

highlighted the risks of going forward with litigation. (App. 367 n.62; 962 F. Supp. at 538 n.62.) The procedural posture of this matter thus stands in sharp contrast to those cases — including *Amchem Prods. Inc. v. Windsor*, __ U.S. __, 117 S. Ct. 2231 (1997) — where the litigation was commenced solely to obtain approval for an already agreed upon resolution.

It is thus hardly surprising that only a minuscule portion of the Class, which consists of the owners of 10.7 million policies, chose to opt out of the Settlement (.22%, or about one-quarter of one percent of the Class). (App. 84-85; 148 F.3d at 318.) An even tinier number of policyholders (about 300) raised objections in the district court (*id.*), and only three small groups of Class Members pursued appeals, two of which have now petitioned this Court for a writ of certiorari. By contrast, and as a credit to Prudential's remarkable commitment to reach out to its policyholders to remedy any injury, a significant number of policyholders have chosen to participate in the Settlement. (App. 540.)

B. The Settlement Involved An Extraordinary Effort To Inform Class Members About The Remediation Plan And To Encourage Their Participation.

Petitioner Johnson's attack on the adequacy of Notice is yet again nothing more than a challenge to the consistent factual findings of the district court which were affirmed by the Third Circuit. As the district court concluded, and the Court of Appeals agreed, the overwhelmingly positive response of Class Members results in large part from the "unparalleled outreach program" established by the Settlement to "ensure that class members [were] adequately informed." (App. 28; 148 F.3d at 297.) Pursuant to the district court's October 28, 1996 Order, "[w]here possible, each individual class member received individual notice" by first class mail. (App. 339; 962 F. Supp.

at 527-28.) Prudential mailed individual Class Notices to over 8 million current and former policyholders (the "November Class Notice"). (App. 107-08; 148 F.3d at 327.) In addition, a Court-approved Summary Notice was published in the largest circulating newspaper in each of the 50 states and the District of Columbia, including *The New York Times*, *The Wall Street Journal*, *USA Today*, and *The Star Ledger*, the principal newspaper in Newark, New Jersey, where Prudential is headquartered. (App. 108; 148 F.3d at 327.) As the district court found, "[d]issemination of the Class Notice in this case [was] extraordinary. . . . Indeed, the dissemination of the Class Notice was ideal." (App. 339; 962 F. Supp. at 527.) The Third Circuit concluded that "the combination of individual and publication notice, combined with the unsolicited news coverage the settlement received, greatly increased the possibility that Prudential will ultimately compensate a greater number of injured policyholders than would otherwise have been possible." (App. 109; 148 F.3d at 327.)

The Court of Appeals and the district court agreed that the Class Notice materials provided "all of the required information concerning the class members' right [*sic*] and obligations under the settlement." (App. 110; 148 F.3d at 328.) As the Court of Appeals explained, the Class Notice:

> detailed the procedures for opting out, entering an appearance, and filing objections, and notified the policyholders that if they did not opt out of the class they would be bound by the settlement if approved. It explained the ADR process and Basic Claim Relief available to the class, provided the text of the release, and provided notification that all related documents were available for public inspection. Finally, it explained the nature of the claims covered under the settlement, and provided an 800 number

> through which class members could obtain information and make further inquiries. The fact that approximately 1.8 million inquiries have already been processed through the 800 number supports the conclusion that the class Notice was effective.

(*Id.*)

Both before and after the district court's approval of the Settlement, additional Notices were sent, further describing the relief available and reminding policyholders that they would have to elect ADR or Basic Claim Relief by the set deadline in order to participate. (App. 109-110 n.92; 148 F.3d at 327 n.92.) Following the district court's approval of the Settlement, a court-ordered Notice was sent to policyholders who had previously excluded themselves from the Class to provide them the opportunity to withdraw that exclusion and participate in the Settlement in light of certain enhancements to the Settlement. (App. 440; 962 F. Supp. at 565.)

Finally, the parties conducted two more massive media outreach campaigns after district court approval. During April, 1997, Class Counsel and Prudential prepared and published Notices concerning the district court's approval of the Settlement and the remediation plan's election deadline in the largest newspapers in all 50 states and the District of Columbia; in national magazines, including *Parade*, *People*, *TV Guide* and *USA Today*; as well as the largest national papers in the Chinese, Korean and Russian languages. (*See* App. 109-10 n.92; 148 F.3d at 327 n.92; App. 440; 962 F. Supp. at 565.) The parties also ran advertisements on all three major television networks and on network radio. A second round of similarly broad advertising followed in May, 1997. (*Id.*) In short, Class Members were repeatedly and fervently urged to participate in the Settlement. (*Id.*; App. 107-08; 148 F.3d at 327.)

These Notice materials included specific references to the "other claims" category about which Petitioner Krell complains. The Court of Appeals concluded, regarding the category of "other claims," that "the class notice makes clear that additional claims which do not fit neatly into one of the other three categories may nonetheless be remedied through the ADR process." (App. 110; 148 F.3d at 328.) In fact, the Court of Appeals stressed that,

> [c]ompared to the first three categories, which require some understanding of insurance policies, the catch-all category of 'other improper sales practices' is arguably easier for the uninformed layman to comprehend, and may in fact encourage class members to respond to the Class Notice.

(App. 111; 148 F.3d at 328.)

These "other claims" had always been part of the case and controversy. Thus, the Court of Appeals also rejected Petitioner Krell's contention that the Class was expanded at the last minute to include "unidentifiable" "other claims." (App. 104-105; 148 F.3d at 325-26.) The First Consolidated Complaint included a class definition of all purchasers of Prudential whole life policies since 1980 (App. 13; 148 F.3d at 292); the Second Consolidated Complaint narrowed the Class by limiting the Class Period but still included *all* purchasers. (App. 180-81; 962 F. Supp. at 468-69.) *Both* broadly covered all claims relating to the sale, servicing and operation of those policies. (*See* App. 16 n.10; 148 F.3d at 293 n.10.) Noting that the "other claims" were "part and parcel" of the plaintiffs' case and specifically identified and covered in the ADR Guidelines, the Court of Appeals concluded that "the [other] claims of the absentee[ ] [Class Members] here are adequately incorporated in the terms of the settlement." (App. 105-06; 148 F.3d at 326.)

REASONS FOR DENYING THE PETITIONS

I.

SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1367, WAS PROPERLY ANALYZED AND INVOKED BY THE COURTS BELOW.

No one disputes that the district court had jurisdiction over class representative Dorfner's federal securities laws claim, and the federal securities claims of other similarly situated plaintiffs. With this jurisdictional foundation, § 1367 grants supplemental jurisdiction over "all other claims that are so related . . . that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). Under this Court's holding in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), a claim is part of the same case or controversy if it "derive[s] from a common nucleus of operative fact" and "would ordinarily be expected to be tried in one judicial proceeding." *Id.* at 725.[4] Both the district court and Court of Appeals, applying the *Gibbs* standard, found that the state law claims of the Class Members here — essentially claims for fraud and negligent misrepresentation — easily met this factual test. (*See* App. 42-43; 148 F.3d at 303; App. 268-70; 962 F. Supp. at 501.)

The district court found that the state law claims share "significant factual elements" and are "so clearly related" to the federal claims that they form a part of the same case or controversy. (App. 269-70; 962 F. Supp. at 501.)

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4. Such claims need not meet the amount in controversy requirement of diversity jurisdiction. 148 F.3d at 305 (holding that because the district court's supplemental jurisdiction was premised on its original federal question jurisdiction and not on diversity grounds, the sufficiency of the amount in controversy was irrelevant.)

As the district court stated:

> Dorfner and others allege that Prudential sold its VAL policies in violation of federal laws through the financing mechanisms and other deceptive sales practices that comprise plaintiffs' state law claims. All the claims are premised upon a common course of conduct by Prudential; all relate to the same alleged company-wide development and implementation of the patently fraudulent sales techniques.

(App. 270; 962 F. Supp. at 501.) The Court of Appeals agreed:

> The Second Amended Consolidated Complaint clearly alleges that Prudential engaged in a common scheme to defraud. Each category of claims raised in the Complaint relied on the implementation of that scheme, the training of Prudential's agents in conformity with it, and the use of pre-approved materials to support it. While only one category of claims alleged in the Complaint involved violations of the federal securities laws, all of the claims derive from the same common scheme, and thus from the same "nucleus of operative fact."

(App. 42; 145 F.3d at 303.) Both courts below concluded under *Gibbs* that plaintiffs' federal and state law claims are "inextricably factually intertwined" and therefore derive from a common nucleus of operative fact. (App. 42; 148 F.3d at 302-03; App. 269-70; 962 F. Supp. at 501.)[5]

5. Both lower courts also concluded that the second prong of the *Gibbs* test, that the claims would ordinarily be expected to be tried in one judicial proceeding, had been satisfied. (*See* App. 39-42; 148 F.3d at 302-03.)

Faced with these clear and powerful findings of the courts below, Krell argues that those courts should have applied a different standard based on this Court's decision in *Kokkonen v. Guardian Life Ins. Co,* 511 U.S. 375 (1994). Krell asserts that *Kokkonen* provides the appropriate standard for determining supplemental jurisdiction under 28 U.S.C. § 1367, that it constitutes a legal standard different from the one in *Gibbs*, and that the *Kokkonen* standard has not been met here. He is wrong on all three points.

Kokkonen and *Peacock v. Thomas,* 516 U.S. 349 (1996) (also cited by Krell) do not even deal with supplemental jurisdiction under § 1367. Rather, both address whether there is ancillary federal jurisdiction to hear state law claims that purportedly relate to federal claims adjudicated in a *prior lawsuit.*[6] It thus should come as little surprise that cases decided by this Court after *Kokkonen* continue to apply the well-established *Gibbs* test to determine whether there is supplemental jurisdiction under 28 U.S.C. § 1367(a). *See, e.g., City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S. Ct. 523, 529-530 (1997).

Moreover, *Kokkonen* and *Peacock* do not announce a new legal standard, but stand only for the unremarkable proposition that a federal claim will not support ancillary federal jurisdiction over a state claim if the facts underlying the two have "nothing to do with each other," (511 U.S. at 380) or if the two types of claims have "little or no factual or logical interdependence" (516 U.S. at 356). This so-called "factual interdependence"

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6. In *Kokkonen*, the subsequent breach of contract lawsuit was brought to enforce the agreement underlying the settlement of a prior diversity action. *See* 511 U.S. at 377. In *Peacock*, the state law claim was to "pierce the corporate veil" after the judgment petitioner had received in a prior ERISA action became uncollectible. *See* 516 U.S. at 352.

requirement is fully consistent with the "common nucleus of operative fact" standard of *Gibbs*.

Indeed, the courts below made just such an analysis of the factual interdependence of the federal and state claims in this case. The district court found that they were "inextricably factually intertwined." (App. 269-70; 962 F. Supp. at 501.) The Third Circuit stated:

> Of course, § 1367 does not permit courts to take jurisdiction over tangentially related claims. . . . Here the facts underlying the investment deception are so intertwined with the other misrepresentations and frauds that, given the allegations of the overall scheme, they have the same factual predicate, making extension of federal jurisdiction appropriate.

(App. 43; 148 F.3d at 303.)

Krell attempts to convince this Court to reexamine these factual conclusions. He relies on Judge Roth's concurrence, in which she states that while Dorfner's federal claims clearly provide supplemental jurisdiction over Dorfner's state law claims and the 30% of Class Members who, like Dorfner, purchased VAL policies which raise both federal and state claims, they may not provide supplemental jurisdiction for the remaining Class Members whose claims arise only under state law.[7] (Krell at 2, 15; App. 158-59; 148 F.3d at 346 (Roth, J., concurring).)

There is, however, no legal basis for a jurisdictional analysis based on the percentage of federal claims in the Class.

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7. Krell's petition is cited to herein as "Krell at __." Johnson's petition is cited to herein as "Johnson at __."

For purposes of supplemental jurisdiction, a court must examine whether the types of state and federal claims asserted would, as a factual matter, arise out of a common nucleus of operative fact regardless of what percentage are federal claims and what percentage are state law claims. In this case, they were found to be "inextricably factually intertwined," an issue Krell did not even dispute before the district court. (App. 270, n.32; 962 F. Supp. at 501, n.32.)[8]

Judge Roth's percentage approach appears to be more of a Rule 23 typicality or adequacy of representation analysis, where the lower court must examine whether the named plaintiffs' claims, both federal *and* state, are representative of the class as a whole. In any event, here again, the lower courts found that these Rule 23(a) requirements clearly had been met. (App. 60-72; 148 F.3d at 309-13; App. 292-324; 962 F. Supp. at 510-22.)

In short, the federal and state claims here are sufficiently interrelated to meet any conceivable standard for supplemental jurisdiction. The undisputed finding of two courts that the federal and state claims in this case arise out of a "common nucleus of operative fact" is dispositive of the subject matter jurisdiction issue here. There is no reason for this Court to review that finding on certiorari.

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8. Krell's contention that the "other claims" are "unknown" and therefore not subject to appropriate analysis for purposes of subject matter jurisdiction is unfounded. As discussed above, the "other sales practices claims" are not only "known," but the category itself exists because these claims are integrally tied to the "financed insurance," "APP" and "life insurance sold as an investment" categories.

II.

THE THIRD CIRCUIT'S DECISION DOES NOT CONTRAVENE *LEWIS v. CASEY.*

Petitioner Krell's attack on the standing of the class representatives is based on the premise that the class representatives "could not assert most of the claims of the Settlement Class." (Krell at 1.) This premise is false and clearly refuted by the opinions below, which hold that the claims of the class representatives were typical of all claims arising out of Prudential's alleged fraudulent sales practices, including claims for "other improper sales practices." As the district court stated:

> [C]lass members injured by "other fraudulent sales practices" have suffered the same injury — they are victims of Prudential's deception — and have suffered the same generic type of harm — they have economic damages — as the named plaintiffs.

(App. 315; 962 F. Supp. at 519.) The Court of Appeals concluded that "the district court's typicality analysis is correct." (App. 66; 148 F.3d at 311.)

Krell seeks to make much of selective quotations from *Lewis v. Casey*, 518 U.S. 343 (1996), a case which arose in an entirely different factual and procedural context. At its core, however, his argument does not rest on *Lewis v. Casey* at all, but on his disagreement with the courts below that "other claims" arising out of fraudulent sales practices are sufficiently factually similar to the claims asserted by the class representatives to confer standing with respect to such "other claims."

Lewis v. Casey was a class action by inmates in various Arizona prisons, who alleged that inadequate legal research facilities in the prisons had deprived them of their right of access to the courts. 518 U.S. at 346. After a trial, only one of 22 named plaintiffs was found to have suffered actual injury, and he was injured by virtue of his illiteracy. *Id.* at 358. Justice Scalia, writing for this Court, held therefore that additional services ordered by the district court for prisoners who had suffered other types of injuries "were not the proper object of this District Court's remediation." *Id.*

Accordingly, *Lewis* stands for the unsurprising proposition that a named plaintiff in a class action, like plaintiffs in individual actions, must demonstrate standing through injury, and cannot rely on the possibility that some other and unidentified member of the class might have suffered injury sufficient to support Article III standing. *Id.*[9] It also holds that the remedies ordered after trial must be related to the injuries actually proven at trial. *Id.* In this case, of course, settlement occurred prior to trial. Injury as a result of defendants' alleged improper sales practices was clearly alleged on behalf of each class representative, however, and the Settlement provides ADR relief for all the claims alleged. Nothing in *Lewis v. Casey*

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9. *Lewis* leaves untouched the well-established principle that where a named plaintiff otherwise has standing and is properly before the Court — as here — the issue of whether that plaintiff may assert the rights of absent class members "is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 2.07 at 2-41 (3d ed. 1992); *cf. Lewis v. Casey*, 518 U.S. at 358, n.6 (distinguishing standing from certification). *See, e.g. Allee v. Medrano*, 416 U.S. 802, 816, n.10 (1974) (holding that where class treatment is proper, named plaintiffs may represent interests of all other class members).

indicates that named plaintiffs lack standing to seek such relief in such circumstances.[10]

Krell seeks to rely primarily on some comments in footnote 6 of the Court's opinion in *Lewis v. Casey* in which Justice Scalia contends that the named plaintiff's standing to complain of the prison's failure to provide access to the courts for illiterate prisoners like himself had not "automatically conferred the right to complain of *all* administrative deficiencies." 518 U.S. at 358 n.6 (emphasis added). Krell tries to assert by analogy that the named plaintiffs' right to assert claims in this case for churning, APP and investment plan claims does not automatically confer a right to complain of other improper sales practices. (Krell at 15.)

This is a specious analogy. Injury as an illiterate did not confer standing to raise claims of non-English speaking prisoners, or prisoners in lockdown, because there was no evidence in *Lewis v. Casey* that such prisoners suffered factually similar types of harm. Here, by contrast, there have been clear and unanimous findings by both courts below that claims

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10. Quite the contrary, *Lewis v. Casey* indicates that, at the pleading stage, even "general allegations" may suffice to provide "standing to demand remediation with respect to various alleged inadequacies in the prison system." 518 U.S. at 357. If so, then the very specific and detailed allegations made on behalf of the class representatives in this case surely conferred standing to settle for relief which remedied such claims. Moreover, as *Lewis v. Casey*, makes clear,

> the inappropriateness of systemwide relief for illiterate inmates *does not rest upon the application of standing rules*, but rather, . . . , upon "the respondents' failure to prove that denials of access to illiterate prisoners pervaded the State's prison system."

518 U.S. at 360 n.7 (emphasis added).

relating to other improper sales practices are sufficiently factually similar to the claims made by the named plaintiffs — and indeed, as to many Class Members, integral to their financing, APP, and investment claims — to permit their assertion in the class action. Footnote 6 of *Lewis v. Casey*, which calls for precisely such individualized determination of the factual relatedness of different types of injuries, is not to the contrary.

III.

PETITIONERS' TYPICALITY ARGUMENT IS BASED ON FACTUAL DISTORTIONS UNWORTHY OF THIS COURT'S REVIEW.

Petitioners' entire typicality argument is based on their theory that the inclusion of "other claims" destroys the Settlement. As shown above, petitioners' "other claims" arguments are factually wrong. The Third Circuit's holding that "other claims" are properly included in the Settlement Class raises no substantial legal issues, and petitioners do not contend that there is any conflict among the courts. This Court need not grant the writ requested to review the lower courts' factual determinations.[11]

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11. As indicated above in note 2, pursuant to the procedures set forth in *GM Trucks*, Prudential did not submit papers in support of class certification in the district court, but stipulated to certification, for settlement purposes only, while reserving all rights.

IV.

PETITIONER JOHNSON FAILS TO DEMONSTRATE WHY THIS COURT SHOULD ADDRESS THE ISSUE OF NOTICE IN THIS CASE.

The district court found that the individual and publication Notice in this case was exceptional (App. 339; 962 F. Supp. at 527-28), and the Third Circuit affirmed this holding. (App. 107-09; 148 F.3d at 327.) Petitioner Johnson's complaints before this Court regarding the content of the Class Notice are nothing more than a rehash of arguments heard and rejected by the lower courts. Petitioner Johnson avers that review of Notice by this Court is necessary in this case in order for the Court to opine on "[w]hat constitutes adequate content of notice of a settlement class action." (Johnson at 8.) There is no conflict among the circuits on this issue, and the Constitutional requirements for adequate class notice are amply spelled out in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and their progeny.

Johnson really seeks nothing more than a review of the lower courts' factual findings regarding Notice in this case. Johnson complains that Notice in this case was

> too long, . . . too detailed, . . . vague regarding the plaintiff's [*sic*] complaints, . . . confusing, and . . . [failed to allow] a reasonable absent member of the settlement class . . . [to] divine his or her rights or make an informed decision regarding remaining in, opting out, or choosing relief.

(Johnson at 5.) The district court examined these issues. It held that the Notice program was easy enough to be understood by the average class member, was both appropriately

comprehensive and brief, and allowed policyholders to make informed decisions as to their Class membership and course of relief. (App. 254-55, 341-42, 353-54; 962 F. Supp. at 495, 526-29, 533-34.) Furthermore, while not necessary to the district court's holdings, the fact that any policyholder with questions could have received individualized help from a neutral third party by simply dialing an "800 number" set forth in numerous places throughout the Notice materials, fully discredits the idea that policyholders could not, and did not, make informed decisions. (*See* App. 110; 148 F.3d at 328.) The Third Circuit reviewed the district court's findings and unequivocally affirmed the adequacy of the Notice program in this case. (App. 110-111; 148 F.3d at 328.) There is simply nothing for this Court to review here.

CONCLUSION

For the foregoing reasons, defendants-respondents The Prudential Insurance Company of America, Robert C. Winters and The Estate of Robert A. Beck respectfully request that the petitions for writ of certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 30 1998
OFFICE OF THE CLERK

No. 98-819

In The

Supreme Court of the United States

October Term, 1998

RICHARD P. KRELL, et al.,

Petitioners,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This petition graphically demonstrates the need for further guidance from this Court to prevent the vices resulting from overly broad nationwide settlements, based primarily on state law claims, similar to those found in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

The Petition is not based on a dispute over factual findings, as Respondents contend, but rather from the lower courts' new excessively broad legal standards for determining (1) the scope of 28 U.S.C. § 1367 supplemental jurisdiction, (2) Article III standing, and (3) the typicality requirement of Fed.R.Civ.P.Rule 23. These new legal standards, which erode procedural protections for Class Members, led to this sprawling settlement class.

Respondents, in their Briefs, in essence, request this Court to ignore the constitutional requirements of standing and jurisdiction, as well as the Rule 23 requirement, grounded in due process, of typicality. A nationwide settlement, however, cannot be used to negate constitutional and Rule 23 safeguards.

This entire 8 million policyholder class was built upon the federal security claim of only one named plaintiff, Martin Dorfner (App. 33), who entered into a single securities transaction in April 1991 (App. 16 n.11) and asserted only a vanishing premium claim and a churning claim. He did not even assert an investment plan claim or one of the undefined "other claims," which may be applicable to millions of policyholders. App. 486-489 and App. 16 n.11. Yet, this entire class settlement of diverse and

individualized state law claims arising in all fifty states and the District of Columbia hinges upon 28 U.S.C. § 1331 federal question jurisdiction over Dorfner's one individual security claim.[1]

Both Article III and the typicality requirement of Rule 23 require that the rights of all class absentees be protected. The limiting principles of supplemental jurisdiction further protect class absentees from release of their very separate and distinct state law claims. These principles are further addressed in the Petition and below.

I. THE LOWER COURTS CREATED A NEW LEGAL STANDARD FOR DETERMINING SUPPLEMENTAL JURISDICTION IN CONFLICT WITH 28 U.S.C. § 1367

Krell's Petition focuses on whether the lower courts properly concluded that a "common nucleus of operative fact" binds the federal claims and the undefined, unpled "other claims," when the record contains *no* facts about the "other claims" to justify that decision.[2] Krell agrees

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[1] Class Counsel, in their Brief, argue that supplemental jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332 also provides a proper basis for federal question jurisdiction. The recent decision of the Tenth Circuit in *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998), is directly to the contrary and forms yet another reason for this Court to grant review to resolve a split within the Courts of Appeals.

[2] Virtually the only information about "other claims" comes from the Class Notice (*not* the September 19, 1996 Complaint), which defines the "Other Claims" as any "other improper life insurance sales practices." App. 487. The so-called "other claims" were first introduced in the settlement

that supplemental jurisdiction is a practical concept designed to improve judicial efficiency. However, because of the generalized definition of "other claims," the lower courts could not have known the legal elements or factual premises of such "other claims" and could not have made a reasoned decision whether supplemental jurisdiction existed.

At Respondents' urging, the strict "common nucleus of operative fact" requirement was replaced by a substantially broader "common scheme" requirement. The lower courts concluded that allegations of a common scheme to defraud policyholders created a "common nucleus of operative fact" without first determining that the undefined "other claims" and Dorfner's federal securities claim require common proof. To avoid detailed analysis of the "other claims," the courts simply presumed that the millions of state and federal claims were united by a "common scheme" and that, therefore, they inherently shared a "common nucleus of operative fact." App. 42. The Panel held that "all of the claims derive from the same common scheme, and thus from the same 'nucleus of operative fact,' " thereby improperly equating a "common scheme" with a "common nucleus of operative fact." App. 42. It constitutes legal error to substitute a "common scheme" for the "common nucleus of operative fact" required by *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966).

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agreement that released them. See the district court approved Class Notice at "Description Of The Law Suits." App. 475-477. *See also* Petition at 3-7.

By substituting non-Article III "schemes" for Article III "claims," there is no longer any meaningful limit to supplemental jurisdiction. A complaint need only make allegations at a sufficiently high level of generality to enable the court to find some aspect of commonality. Indeed, in *Lewis v. Casey*, 518 U.S. 343 (1996), supplemental jurisdiction would have been maintainable based on a pled "common scheme to deprive all prisoners of their constitutionally protected rights." This result, based on a "scheme" instead of a "claim," is inconsistent with Article III. The fact that federal and state claims "all derived from the same common scheme" is insufficient where, as here, proof of the scheme would not establish any of the potential millions of "other claims."

The lower courts, without knowing the elements of the undefined millions of "other claims," could not undertake the required *Gibbs* analysis. Thus, the assertion of jurisdiction over Class Members with only "other claims" was improper since there was no finding that the federal claim and the millions of "other claims" "share significant factual elements." *See HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1198 (3d Cir. 1996). The prerequisite that Dorfner's federal securities claim rely on basically the "same" facts as the millions of potential unknown "other claims" cannot possibly be determined on the existing record. *See* American Law Institute, Federal Judicial Code Revision Project, Tentative Draft No. 2, pp. 32-35 (April 4, 1998), defining the narrow scope of an Article III "claim," which definition has no similarity to that of a so-called "common scheme."

As to the other *Gibbs* jurisdictional prerequisites, it is meritless to suggest that Dorfner, in pursuit of his securities law claim, would be expected to litigate on behalf of millions of other policyholders who had only state law claims, most of which were the undefined "other claims." It is simply unfathomable that one named plaintiff, with a 1991 federal securities claim, and not even a pled "investment claim," would be expected to litigate claims for millions of policyholders with only investment claims or only unpled, undefined "other claims."

It is the settling parties' heavy burden to demonstrate an adequate basis for subject matter jurisdiction. "It is to be presumed that a cause *lies outside* this limited jurisdiction . . . " (emphasis added). *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The settling parties here have not met that burden. The lower courts' judicial expansion of supplemental jurisdiction is inconsistent with Article III and warrants this Court's intervention.[3]

II. THE LOWER COURTS ALSO CREATED NEW, LESS RESTRICTIVE ARTICLE III STANDING REQUIREMENTS

Broad allegations of a scheme to defraud, instead of specific claims giving rise to injury, do not satisfy Article III. Perhaps more than on any other issue, the rulings

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[3] Respondents' attempts to distinguish *Kokkonen* and *Peacock v. Thomas*, 516 U.S. 349 (1996) on the ground that they address ancillary jurisdiction, rather than pendant jurisdiction, are meritless. 28 U.S.C. § 1367 codified both ancillary and pendant jurisdiction and condensed both concepts under the term "supplemental jurisdiction."

below run afoul of this Court's standing decision in *Lewis v. Casey*, 518 U.S. 343 (1996). The question in *Lewis* was whether prisoners with one type of claim, failure to provide special services for an illiterate prisoner, could represent other prisoners with different complaints, such as the lack of special services or facilities required by non-English speakers, by prisoners in lockdown, and by the inmate population at large. This Court rejected that attempt, because the different groups of prisoners asserted different kinds of claims and injuries. *Id.*, at 358 n.6. Yet, if the judicial path endorsed below had been followed, *Lewis* could be very easily circumvented by class allegations that "defendants violated class constitutional rights to access to the courts." Stated another way, the more general the allegations, the less of a barrier the law of standing creates. This potential for eviscerating *Lewis* by utilizing "schemes" instead of Article III claims provides another significant reason for granting review.

III. THE LOWER COURTS ALSO CREATED A NEW, LESS RESTRICTIVE "TYPICALITY" REQUIREMENT

A broadly alleged "scheme to defraud" likewise does not substitute for the "typicality" standard under Rule 23(a). Although there are virtually no facts in the record about the "other claims" and not a single named policyholder who even asserted such a claim, the courts below allowed a single named plaintiff (Martin Dorfner) with a federal securities law claim to represent millions of policyholders with only "other claims." The lower courts reached this conclusion by making the same error that affected their rulings on subject matter jurisdiction and

standing: they allowed general allegations of a "scheme to defraud," and a demand for "economic damages" for all policyholders, to substitute for the stringent typicality requirement of Rule 23(a)(3).

Such an outcome runs directly contrary to the spirit, if not the holding, of *Lewis*. It is totally inconsistent with *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), where employees who claimed racial discrimination in job promotion were denied the right to represent potential employees whose claims were based on discrimination in job applications. Nor can such a result be squared with this Court's recent decision in *Amchem*, which set aside a settlement because the class was too diverse and too rife with conflicts to meet the requirements of Rule 23(a). The effort to homogenize the class in *Amchem* was done by alleging that everyone was similarly interested in maximizing their recovery from defendants from their asbestos injuries. This Court declined to allow such broad-brush treatment, yet that is precisely what was endorsed below as to "other claims."

Indeed, this settlement is even more egregious than in *Amchem* because in that case at least there were named plaintiffs who purported to represent each of the different components of the class. Moreover, the legal basis for each subclass's claims in *Amchem* was known. Here, by contrast, there is no identified named policyholder who asserted an "other claim," and there are no facts in the record that demonstrate the factual bases for, or elements of, those claims.

At most, the record demonstrates that Dorfner and the other named policyholders only "intended" to assert

one or more of the possible thousands of unknown "other claims" of millions of Class Members (App. 54), *but did not do so*. A mere "intention" to state a claim does not satisfy the demands of either Article III or the Federal Rules of Civil Procedure. The fulfillment of these requirements is essential to safeguard the class, especially in a class action respecting the life insurance policies of eight million persons.[4]

As demonstrated by Class Counsel's September 19, 1996 Complaint, filed after extensive motion practice and substantial discovery, no attempt was made to plead claims other than the three identified sales practice claims. *See, e.g.*, September 19, 1996 Complaint ¶ 177 which stated that "Plaintiffs' claims are typical of those of the Class Members: each was victimized by one or more of the "churning," "vanishing premium" or "investment plan" aspect of Prudential's fraudulent scheme." Thus, the lower courts confronted a record that could not have enabled them to make the required determinations under Rule 23(a)(3), and hence their conclusions that the claims of the named policyholders were typical of those policyholders with "other claims" are unsustainable as a matter of law.

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[4] The abrogation of the procedural safeguards of Rule 23(a)(3) may be highlighted by the settlement results. While the settlement may be excellent for the owners of less than 15% of the policies, the owners of at least 9.1 million (85%) of the 10.7 million class policies will not receive any remedy in exchange for their releases. App. 540a. This is despite the fact that "Prudential's misconduct injured all Class Members." *See* Class Counsel's Brief at 12.

As with the other issues presented by the Petition and in this Reply, the errors below under Rule 23(a)(3) are of significance far beyond this lawsuit, and hence warrant review by this Court.

CONCLUSION

For these reasons and those set forth in the Petition, the writ should be granted.

Respectfully submitted,

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Dated: December 30, 1998